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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. [redacted] 80

314-706

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

THE BANK OF NOVA SCOTIA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 993

THE PEOPLE OF PUERTO RICO,

Petitioner,

vs.

THE BANK OF NOVA SCOTIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, The People of Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered in this cause on December 18, 1940, affirming the order or decree of the District Court of the United States for the District of Puerto Rico approving the receiver's final report and distribution in a consolidated foreclosure suit and overruling the objections of this petitioner, The People of Puerto Rico, that the Court had failed to give priority to some $100,000.00 of deferred taxes, as required by the statutes of Puerto Rico.

SUMMARY STATEMENT

1. The suit was a consolidation of several foreclosure suits against the Benitez Sugar Company and the part-

nership or "community" [Spanish *"Comunidad"*], "Jose J. Benitez e Hijos", hereinafter called, for convenience, *"the community"*, and other parties.

On September 18, 1939, at its May Term, 1939,[1] the District Court entered a foreclosure decree, foreclosing mortgages held by the Bank of Nova Scotia, the respondent here, on properties of the sugar company and of the community, ordering their sale by a special master and distribution of the proceeds in accordance with priorities fixed by the decree. This petitioner, The People of Puerto Rico, was claiming first priority, ahead of the bank's mortgages, for the unpaid real estate taxes, in two categories; viz., *first,* those for the current year and the three preceding fiscal years; and *second,* those for earlier fiscal years, which had been "deferred" by the Treasurer upon applications made by the receiver on or about September 21, 1938 [R. 62, 66], upon orders of the District Court of July 9, 1937 [R. 62, 66], under Act No. 23 of the Legislature of Puerto Rico of July 16, 1936, as amended by Act No. 122 of May 13, 1937 (Appendix III, *infra,* pp. 51-57).

That statute authorized the Treasurer to defer the collection of unpaid real estate taxes, and spread the payment over a term of twenty years; and Section 5 of the Act expressly provided (Appendix III, *infra,* pp. 52-53):

> "The amount of the deferred-tax receipts issued under this Act shall constitute *a preferred lien* on the property subject to the unpaid and deferred tax. *This lien shall have preference and priority over any other lien which already burdens* or may be hereafter constituted on said premises. * * *," (*Italics supplied*)

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[1] Section 42 of the Organic Act for Puerto Rico (Act of March 2, 1917, c. 145, 39 Stat. 951, 966) provides:

> "Regular terms of the said United States district court shall be held at San Juan, commencing on the first Monday in May and November of each year."

and expressly amended prior statutes accordingly.

The District Court in its foreclosure decree of September 18, 1939, allowed priority over the mortgages to the unpaid taxes for the current year and the preceding three fiscal years, amounting only to some $5,000; but [notwithstanding the statute] *denied priority to the unpaid deferred taxes* for the earlier years, aggregating something over $100,000, and held them subordinate to the bank's mortgage liens (R. 62-68; 72-73; 81-82). In so doing the District Court followed its own earlier decisions in two foreclosure suits brought by the Federal Land Bank of Baltimore,[2] wherein it had held on February 27, 1939, and had reiterated the holding on March 10, 1939, that the Legislature of Puerto Rico was without power, in extending past due taxes, to provide that the taxes so extended should constitute a lien prior to a mortgage which, before the enactment of that statute, had stood ahead of all taxes except those for the current year and the three preceding fiscal years. The District Court considered that

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[2] Equity No. 2284 in the District Court, the *Federal Land Bank of Baltimore*, complainant, vs. *Emiliano Torres Garcia, et al.*, defendants; and Equity No. 2229, the *Federal Land Bank of Baltimore* vs. *Dominga Tirado, et al.*, defendants. Decision in the *Emiliano Torres Garcia* case, February 27, 1939 (Appendix I, *infra*, pp. 38-41); followed March 10, 1939 by that in the *Dominga Tirado* case (Appendix I, *infra*, pp. 36-38). The records in both cases included in the same printed transcript of the record in the Circuit Court of Appeals for the First Circuit, there entitled (the two cases in the one transcript) "No. 3458, The People of Puerto Rico, appellant, v. Federal Land Bank of Baltimore, plaintiff-appellee; and No. 3459, *Same* v. *Same*." **A certified copy of that transcript is filed in this Court with this petition for certiorari.** In that transcript the decision of the District Court, *supra*, February 27, 1939, in the *Torres Garcia* case appears on pages 48 to 50; and the District Court's decision of March 10, 1939, in the *Dominga Tirado* case appears on pages 22 to 24 of the transcript.

such action by the Legislature "would be a violation of the terms of the Organic Act which prohibits the Legislature from passing any law which will impair the obligation of contracts" [District Court's decision in the *Torres Garcia* case, *supra*; Appendix I, *infra*, p. 40; followed in the *Dominga Tirado* case, *supra*, Appendix I, *infra*, p. 37].

Both of those Federal Land Bank decisions were pending, undecided, in the Circuit Court of Appeals for the First Circuit on appeal from the District Court, on September 18, 1939, the date of the entry of the foreclosure decree in the present case; which simply followed them, without further argument, in denying priority to the deferred taxes in this case ("Conclusions of Law", "(E)", R. 72-73). The District Court did, however, insert in the foreclosure decree, as its final paragraph, the following (R. 85):

> "O. All questions, issues, matters and things not hereby disposed of are hereby reserved by the court for its further adjudication, and any party to this cause may at any time apply to the court for further relief at the foot of this decree in respect of any matters not herein specifically provided for. **For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued."** (*Emphasis supplied*)

2. The May Term, 1939, of the District Court ended on Tuesday, October 31, 1939 (Organic Act, Sec. 42, *ante*, footnote 1, p. 2); and the next term, the November Term, began the following day, Wednesday, November 1, 1939.

3. **Three months** (lacking one day) **after** the District Court's entry of the foreclosure decree of September 18, 1939, in the present case, **the Circuit Court of Appeals, on December 15, 1939, handed down its opinion in the *Federal Land Bank* cases, reversing the District Court, and expressly upholding**

the power of the Legislature to give priority to the deferred taxes over antecedent mortgages, and accordingly upholding the validity of Section 5 of the insular Act of July 16, 1936. [*People of Puerto Rico* vs. *Federal Land Bank,* 108 F. (2d) 275, 276-278; copy of opinion in Appendix II, *infra,* pp. 42-48]. Rehearing was denied by the Circuit Court of Appeals the next month, on January 19, 1940 (*People of Puerto Rico* vs. *Federal Land Bank, supra,* 108 F. (2d) 275). No petition for certiorari for review of that decision was ever filed. It stands unassailed. Its correctness has never been questioned in this case. In view of that decision of the Circuit Court of Appeals, so much of the foreclosure decree of the District Court of September 18, 1939, in the present proceeding, as denied priority to the deferred taxes (*ante,* p. 3; R. 72-73) was plainly erroneous. The statute being valid, the deferred taxes were plainly entitled to priority over the mortgages.

4. The date of that decision of the Circuit Court of Appeals in the *Federal Land Bank* cases, December 15, 1939 (as well as that of the Circuit Court's denial of the rehearing, January 19, 1940), was during the November term, 1939, of the District Court,—the next succeeding term after the May term at which the foreclosure decree of September 18, 1939, had been entered; and was, consequently, during the term to which, by the last sentence of the final paragraph, "O", of that decree (R. 85; *ante,* p. 4), "the present term of this court" had been "continued".[3]

The first question here presented is, therefore, of the meaning and effect of that provision of the decree. (*Infra,* "Questions Presented", pp. 9-10).

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[3] "For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, * * *, the present term of this court is continued."

5. Promptly, only eleven days after the decision of the Circuit Court of Appeals, and at the same November, 1939, term of the District Court, this petitioner, the People of Puerto Rico, on December 26, 1939, filed in the District Court its petition ["motion"] for reconsideration (R. 86) of so much of the foreclosure decree of September 18, 1939, as related to the priority of the tax liens. The petition was based on the Circuit Court of Appeals' decision in the *Federal Land Bank* cases.

On January 31, 1940 [still at the same November, 1939, term], and eleven days after the Circuit Court of Appeals' denial of reconsideration in the *Federal Land Bank* cases, the District Court entered its order denying (R. 88-92) this petitioner's request for reconsideration of the foreclosure decree, with reference to the tax lien priorities. The District Court held: FIRST, that, in view of the expiration of the term at which the foreclosure decree was entered [the May term, 1939; *ante*, pp. 2, 4], and of the "finality" of that decree, the court was without power to reopen it, or to reconsider the question of the tax priorities;[4] and, SECOND, that, in any event, the motion for reconsideration should be denied on the merits

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[4] The District Court said (R. 89):

> "Such a decree is clearly a final one for it determines the rights of the parties so that nothing is left to be done but the execution of its provisions. Affirmance of such a decree by the appellate court would end the suit and execution of the provisions thereof by this court would be all that remained to be done. *The reservation in the decree for further directions simply related to such execution and cannot be availed of as rendering it less final or as leaving open points expressly decided by it at the time it was entered.*" (*Italics supplied*)

Whether the District Court had power to bind the Court of Appeals, or this Court, by its subsequent construction of the meaning of its own prior decree in that way, is another question here presented. ("Questions Presented", *infra*, pp. 10-11).

because, as the District Court said (R. 90-92), Section 5 of the earlier Act of August 19, 1933, providing for deferment of taxes (Act No. 10; Appendix III, *infra*, pp. 49-50) had been amended by Act No. 14 of August 24, 1933 (*infra*, Appendix III, pp. 50-51); that (R. 90):

> "* * * After approval of that amendatory Act of August 24, 1933, the tax lien of The People of Puerto Rico on realty was expressly limited to the assessments for the three prior and the current fiscal years. And this was so whether the payment of such taxes had been extended under Act 10 of 1933, or not.
>
> "*Thus at the time the receiver appointed herein went into possession of the properties object of these foreclosure proceedings on or about October 20, 1936*, the tax lien of The People of Puerto Rico was by express statute restricted to the current fiscal year of 1936-1937 and the three prior fiscal years, and this court so held in its decree of September 18, 1939." (*Italics supplied*)

The District Court's error and confusion of the statutes is manifest. **The Act of July 16, 1936** (Appendix III, *infra*, pp. 51-55; *ante*, pp. 2, 5), carrying an emergency clause putting it into immediate effect (Sec. 17; Appendix III, *infra*, p. 55) **had gone into effect more than three months before October 20, 1936,** the date to which the District Court refers as that on which the foreclosure proceedings were begun; and was in effect on that date. It was under that very Act of July 16, 1936 [as (*immaterially*) amended by that of May 13, 1937], that the Receiver's applications for the deferment of these taxes had been made under the District Court's own directions, by its orders of July 9, 1937 [*ante*, p. 2; R. 62, 66]. It was Section 5 of that very same Act of July 16, 1936, which expressly declared that the lien for the deferred taxes,

> "shall have preference and priority over any other lien which already burdens or may be hereafter constituted on said properties",

and expressly amended prior statutes accordingly. It was

likewise that same Section 5 of that same Act of July 16, 1936, which the Circuit Court of Appeals in its opinion in the *Federal Land Bank* cases, *supra*, had quoted and had expressly upheld (*People of Puerto Rico* vs. *Federal Land Bank, supra*, 108 F. (2d) 275, 276-277, *et seq.*; Appendix II, *infra*, pp. 43-44, 48) in reversing the District Court in those cases.

Manifestly the District Court was simply confused in this. The Act of August 24, 1933, to which the Court refers (R. 90, *supra*), had been expressly amended by Sections 5 and 14 of the Act of July 16, 1936, so as to extend "for a period of twenty (20) years" the lien of the deferred taxes (Appendix III, *infra*, pp. 52-53, 54). The sequence of the statutes and of the proceedings, in relation to the history of this case, is in Appendix IV, *infra*, pp. 59-65, "CHRONOLOGY".[5]

6. This petitioner, The People of Puerto Rico, did not perfect any appeal from the January 31, 1940, order of the District Court,[6] but considered it interlocutory, and that

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[5] It should be said that the confusion appears to have started with an erroneous reference (R. 86), in the petion for reconsideration itself, to the Act of 1933, as the basis for the Circuit Court's decision in the *Federal Land Bank* cases; which were really based wholly on the 1936 Act (108 F. (2d), *supra*, 275, 276-277; Appendix II, *infra*, pp. 43 *et seq.*). The District Court correctly points this out (R. 90); but then proceeds (R. 90-91) to fall into its own confusion as to the statutes in force on October 20, 1936, as stated in the text, above.

[6] Petitioner did file a formal "Notice of Appeal" from this order; but one day too late under the Rules of Civil Procedure. The appeal was, therefore, dismissed by the Circuit Court of Appeals (R. 117; Footnote 10, *infra*, p. 18). The Rules of Civil Procedure were then new in Puerto Rico, having gone into effect in relation to the District Court of the United States for the District Court of Puerto Rico only on March 1, 1940 (Footnote 13; *infra*, p. 21). The abortive appeal from the order of January 31, 1940, appears to be immaterial here for any purpose, except as indicating that petitioner never acquiesced in it.

the court still retained the power during the balance of that same term,—[the November, 1939, term of the District Court],—to reconsider the matter and to make such order with relation to the tax priorities as it should deem right. Meantime, the foreclosure sale had proceeded; **the properties had been bought in by the complainant itself in the foreclosure suit, the Bank of Nova Scotia, the respondent here;** and the receiver had turned over possession of the property to the respondent bank as the purchaser. The receiver then presented his final report and account, and this petitioner, The People of Puerto Rico, then [still at the same November, 1939, term of the District Court] filed objections to the report on the same grounds as before, that the receiver, under the Court's directions, had not paid the deferred taxes as a prior claim; and the matter came on for the District Court's decision on the objections.

7. On April 3, 1940 [still at the same November term, 1939, which continued to run, under the statute, until Tuesday, April 30, 1940], the District Court again decided the matter adversely to this petitioner [R. 98-99], still adhering to the position taken in its order of January 31, 1940 (*ante*, pp. 6-8; R. 88-92, *supra*). The People of Puerto Rico, this petitioner, appealed to the Circuit Court of Appeals; which, by its opinion and judgment December 18, 1940, affirmed the April 3, 1940, order of the District Court, refusing to reopen the question of the tax priorities as fixed by the foreclosure decree (*ante*, p. 1; R. 114-119; 116 F. (2d) 379-381).

QUESTIONS PRESENTED

First. Under the circumstances of this case, and particularly in view of the appeals then pending, undecided, in the Circuit Court of Appeals from the District Court's own earlier decisions in the *Federal Land Bank* cases involving the same question of the validity of the insular statute giving priority to deferred real estate taxes, is not

the final sentence of the concluding paragraph of the foreclosure decree of September 16, 1939 ["O", R. 85; *ante*, p. 4], directing that:

> "For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued",

clearly to be interpreted, in accordance with its literal wording, as intended to continue "the present term of this court", "For the purpose of *making any further order or decree* in relation to *any matter* arising in connection with this decree",—including any modification of it with relation to the relative priorities of the deferred real estate taxes that might thereafter become necessary or proper in order to conform to the Circuit Court of Appeals' ultimate decision in the then pending undecided *Federal Land Bank* cases?

Petitioner believes that it should be so construed. The lower courts held the contrary.

SECOND. Should any especial weight be given to the District Court's own subsequent interpretation, at a later term, by its order of January 31, 1940, of the meaning of the final paragraph of the foreclosure decree, as being limited (R. 89) "simply to such execution" ["of the provisions thereof by this court"], "and cannot be availed of * * * as leaving open points expressly decided by it at the time it was entered"?

Is such *subsequent interpretation* by the District Court of its decree at a former term entitled to any more weight than an interpretation by any party to the cause, or by any other lawyer reading the language of the decree?

Or, if so, if the District Court thus retained power over the decree for the purpose of interpreting it authoritatively at a subsequent term, then did it not, in equal measure, likewise retain power to modify the decree so as to make it accord with the law as interpreted by the Circuit Court of Appeals in reversing the District Court in

the *Federal Land Bank* cases, and so as to conform to the statutes of Puerto Rico?

THIRD. Did not the District Court, by virtue of the above quoted final sentence of the concluding paragraph, "O", in the foreclosure decree, continuing the term for the purposes of *"any matter arising in connection with this decree"*, retain power over the matter *during the whole of the next ensuing term,*—the November, 1939, term,—and until its expiration on April 30, 1940, including power to re-open and reconsider the question of the priorities of the deferred taxes *at any time during that term;* and, therefore, to do so, upon the objections of this petitioner to the receiver's final report,—the objections overruled by the order of April 3, 1940 (R. 98-99) from which this petitioner's appeal was taken to the Circuit Court of Appeals in the present case?

FOURTH. Was there not in the foreclosure decree "error apparent" on the face of the decree, within the meaning of Lord Bacon's First Ordinance in Chancery, in that the decree on its face violated the Puerto Rican statute concerning the priority of the lien of deferred real estate taxes; so that, in any event, the District Court had power to reopen and to reconsider it upon the motion for reconsideration, viewed in the light of a bill of review, at the next term following that at which the decree was entered?

FIFTH. Was not the action of the District Court in refusing to exercise the power it had reserved under the final paragraph of the foreclosure decree,—or which it possessed [treating the motion for reconsideration as a bill of review] because of the "error apparent" on the face of the decree in this respect,—to modify the decree at a subsequent term so as to conform to the decision of the Circuit Court of Appeals establishing the validity of the Puerto Rican statute and the consequent priority of the deferred taxes,—and was not the action of the Circuit Court of Appeals in affirming the order of the District Court making such refusal, and thereby depriving the public Treasury of Puerto Rico of more than $100,000

of revenue to which it was clearly entitled under the statutes of Puerto Rico,—such a departure by the District Court, and such a sanctioning of such departure by the Circuit Court of Appeals, from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision by *certiorari*?

OPINION OF THE CIRCUIT COURT OF APPEALS

As above stated the Circuit Court of Appeals affirmed the order of the District Court refusing to disturb the foreclosure decree of September 18, 1939. The Circuit Court quoted (R. 116; 116 F. (2d), *supra*, at p. 380), what was said by the District Court in its order of January 31, 1940, denying reconsideration of the foreclosure decree (R. 89; quoted *ante*, p. 6; footnote 4) as to the "reservation in the decree"[7] not "rendering it less final or as leaving open points expressly decided by it at the time it was entered"; and said (R. 117; 116 F. (2d), *supra*, at p. 381):

> "We accept the District Court's interpretation of its own decree".

The Circuit Court also notes (R. 116-117; 116 F. (2d), *supra*, at p. 381) that: "Somewhat similar phraseology in decrees in other cases has been similarly interpreted"[8]; and concludes (R. 118; 116 F. (2d), at p. 381):

> "From this review of the facts it is apparent that the relative priorities of the Bank and the insular government in the mortgaged properties were determined by the decree of September 18, 1939, and had become *res judicata*. These issues could not be raised again at the later stage in the receivership when the

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[7] Paragraph "O", R. 85; *ante*, p. 4.

[8] Citing: *Lewisburg Bank* v *Sheffey*, 140 U. S. 445; *Mayer* v. *White*, 8 Cir., 12 F. (2d) 710; *American Engineering Co.* v. *Metropolitan By-Products Co.*, 2 Cir., 275 Fed. 40; *Kiehn* v. *Dodge County*, 8 Cir., 19 F. (2d) 503. But these cases fail to support the Circuit Court's opinion in this. *Confer, infra*, Point III, pp. 26-28.

court was considering whether to approve the receiver's final report.'"[9]

PETITIONER'S POSITION

As above indicated, petitioner, The People of Puerto Rico, believes that, in view of the final paragraph "O" (R. 85) of the foreclosure decree continuing "the present term" for the purpose of making any further order or decree in relation "to any matter arising in connection with this decree", the District Court possessed the power, during the whole of its next term, to amend the decree so as to conform to the law as established by the decision of the Circuit Court of Appeals in the *Federal Land Bank* cases upholding the validity of the Act of the Legislature of Puerto Rico of July 16, 1936, and, consequently, the priority of the deferred taxes; and that, therefore, it was the District Court's plain duty to modify the foreclosure decree accordingly and to preserve to the public revenues of the insular government the more than $100,000 of those taxes to which the Treasury was entitled under the Puerto Rican statutes. And that, in in any event, there was "error apparent" on the face of the foreclosure decree itself, within the meaning of Lord Bacon's First Ordinance in Chancery, in that it shows on its face that it was in direct violation of the Puerto Rican statute [whose validity was shortly afterwards definitely established by the decision of the Circuit Court of Appeals in the *Federal Land Bank* cases]; so as to be open to re-examination by the District Court at its next following term, upon the motion for reconsideration,

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[9] Citing: *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555-556; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207; *Hinckley* v. *Gilman, etc. R. R. Co.*, 94 U. S. 467, 469; *Mayer* v. *White*, 12 F. (2d) 710; *Reed* v. *Allen*, 286 U. S. 191. Those cases, however, hold only that, once a matter has become *res judicata*, it cannot be reopened at a subsequent term.

treated as a bill of review. And hence that the District Court was in error in failing to make the modification and to recognize the priorities of the Treasury; and and that the Circuit Court of Appeals likewise erred in sustaining the District Court in such failure. And that such failure of the lower courts to apply and enforce the plain statutory rights of the public Treasury in this respect constituted such a departure by the District Court, and such a sanctioning of the departure by the Circuit Court of Appeals, from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by the writ of *certiorari*. And, further, that the cases cited by the Circuit Court of Appeals in support of its opinion (R. 116-117, 118; 116 F. (2d), *supra*, at pp. 380, 381; *ante*, pp. 12, 13, Footnotes 8 and 9) do not support it; but, on the contrary, rather indicate misapprehension or misapplication of those decisions.

STATUTES

The Act of the Legislature of July 16, 1936, here principally involved, together with other cognate insular statutes and provisions of the insular Civil Code and of the Mortgage Law are in Appendix III, *infra*, pp. 49-58.

REASONS FOR GRANTING THE WRIT

As above indicated, ("Questions Presented," *ante*, pp. 9-12; and "Petitioner's Position", *ante*, pp. 13-14), it is believed that the lower courts, the District Court of the United States for the District of Puerto Rico, and the Circuit Court of Appeals for the First Circuit in affirming the District Court, have here fallen into serious error in an important matter of federal law and procedure, seriously affecting the public revenues of the Government of Puerto Rico, a Territory of the United States. That the District Court, in its procedure in this case, in failing to exercise its power to re-open its foreclosure decree of September

of Puerto Rico, April 3, 1940, R. 98-100] are not officially reported. The "*Per Curiam*" opinion of the Circuit Court of Appeals for the First Circuit (R. 114-118) is in 116 F. (2d) 379 (Advance Sheets).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered on December 18, 1940 (R. 118-119). The time within which to apply for a writ of *certiorari* to this court was extended by order of MR. JUSTICE FRANKFURTER, until and including April 17, 1941 (R. 119), and afterwards, by another order of MR. JUSTICE FRANKFURTER, until and including April 26, 1941 (R. 120).

QUESTIONS PRESENTED

The questions here presented are stated in the Petition (*ante*, pp. 9-12).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, p. 14), and in Appendix III (*infra*, pp. 49-58).

STATEMENT

A statement of the case is in the Petition (*ante*, pp. 1-9); and a "Chronology", indicating the sequence of the statutes and of proceedings here involved, is in Appendix IV (*infra*, pp. 59-65).

SPECIFICATIONS OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Position" in the Petition (*ante*, pp. 9-12 and 13-14).

SUMMARY OF ARGUMENT

The argument is summarized under the headings "Petitioner's Position" and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 13-14 and 14-15).

ARGUMENT

Introductory

It may be agreed that the foreclosure decree of September 18, 1939, was final and appealable as the Circuit Court of Appeals says it was (R. 116, 118; 116 F. (2d), at pp. 380, 381), in so far as it determines the relative priorities of the mortgages and of the deferred real estate taxes; and that after the expiration of the May term, 1939, at which it was entered, the District Court would have to be regarded as without power to re-open or to reconsider that question, either when considering whether to approve the receiver's final report, or at any other time; **unless** upon either or both of two grounds, both of which, however, exist here: FIRST, That the power was reserved by the last sentence of the final paragraph "O" of the decree; and, SECOND, That in respect of this question there existed "ERROR APPARENT" on the face of the decree; inasmuch as, on its face it was unquestionably in direct violation of the statute of Puerto Rico,—a statute whose validity had never been questioned at all, except by the former orders of that same District Court itself in the *Federal Land Bank* litigation, and whose validity was shortly afterwards directly established by the judgments of the Circuit Court of Appeals reversing the District Court in those *Federal Land Bank* cases.

The District Court had the power, on both of these grounds, to re-open the question, and to modify its decree, at its next succeeding term. Possessing the power, it was its plain duty to do so; and to conform its decree to the statute and to the decision of the Circuit Court of Appeals. The power existed throughout the whole of that term, the District Court's November, 1939, term. It was not exhausted by the January 31, 1940, order refusing to re-open the decree; but was still in existence throughout the term, and should have been exercised upon the objections of The People of Puerto Rico

to approval of the receiver's report final and his discharge. The abortive attempt of The People of Puerto Rico to appeal from the January 31, 1940, order [10] is important only as indicating that The People never acquiesced in the court's action. The fact that The People did not appeal from the original foreclosure decree of September 18, 1939, is indicative of their understanding that the final paragraph "O" continuing "the present term" for "the purpose of making any further order or decree in relation to any matter arising in connection with this decree" (R. 85) effectively reserved the District Court's power in this respect, awaiting the decision in the *Federal Land Bank* cases, then still undecided in the Circuit Court of Appeals.

POINT I

The final sentence of the concluding paragraph "O" of the foreclosure decree of September 18, 1939, effectively reserved to the District Court the power at its succeeding term to reopen and to reconsider the provisions of the decree with reference to the relative priorities of the mortgages and the deferred real estate taxes.

A. The language of the final sentence of the decree, taken literally, undoubtedly goes to this extent. The sentence reads (R. 85; *ante*, p. 4):

> "For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued."

It will be observed that there is in this wording nothing specifically tying this sentence up to the preceding sentence of the paragraph; or to anything else limiting the literal wording of this sentence itself. For example, it

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[10] Notice of appeal filed one day too late; and appeal therefore dismissed by the Circuit Court of Appeals [Circuit Court's opinion, R. 117; 116 F. (2d) at p. 381]. *Confer*, Footnote 6, *ante*, p. 8.

does not contain any word like "such", or anything of that kind referring back, or tying it to the preceding sentence of the paragraph. It does not say "in relation to any *such* matter"; but "*in relation to any matter arising in connection with this decree*". On its face, it stands independent, unlimited.

B. In construing this sentence of the decree, as well as the whole decree, **the ordinary rules of construction must be borne in mind.** Of course it is to be construed in connection with the context; but the other familiar rules of construction are to be remembered also; among them that: (a) In construing any document, whether a contract or will or decree of a court, the situation of the parties at the time, and the surrounding circumstances, so far as they appear in the record, are to be considered. We are to put ourselves, so far as possible, into the shoes of the parties as they stood at the time. And (b) an endeavor is to be made to give effect to every word and phrase. Nothing is to be disregarded to which, reasonably, effect may be given, in arriving at the true intention of the parties, as shown on the face of the writing [here, of the decree].

C. Thus construing this final sentence of this decree in accordance with these and the other established rules of interpretation, and in connection with the preceding sentence of the final paragraph "O",—and with the entire decree and the whole record in this case,—it is believed that, clearly, **the last sentence is to be treated as independent of the preceding sentence, and as meaning exacting what it literally says.** That is to say that, just as it reads, without any limitation, "For the purpose of making *any further order or decree* in *relation to any matter* arising in connection with this decree, or any sale thereunder, *the present term* of this court *is continued*" (*Italics supplied*). That language is, of course, broad enough on its face to reserve the power to reconsider the provisions of the decree with relation to the relative priorities of the mortgages and the deferred taxes.

D. Placing ourselves in the shoes of the parties as they stood at the time, that would seem to be the purpose of this final sentence; that it should stand by itself; should mean exactly what it says; and should be effective to reserve the court's power to deal, afterwards, "with any matter arising in connection with this decree", including this question of tax priorities.

It must be borne in mind in this connection that the District Court in that decree was deliberately disregarding the statutes of Puerto Rico, the Act of July 16, 1936, as amended by that of May 13, 1937, as well as the earlier Act of August 19, 1933.[11] In thus directly disregarding the plain provisions of the Puerto Rican statutes, which expressly gave priority to the deferred taxes (Sec. 5, Act of July 16, 1936; and Sec. 5, Act of August 19, 1933, in connection with the final *Proviso* of Sec. 2, Act of July

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[11] "Conclusions of Law", "V-(E)"; R. 72-73; in connection with "Findings of Fact" 19 (a), (c), (d) and (f), and 21 (c), (e), and (i), and related findings; R. 61-68. The District Court expressly holds ("Conclusions of Law", "V-(E)", *supra*, R. 72-73):

> "The People of Puerto Rico did not acquire a lien on the properties of the community and of the corporation, or any of them, superior to nor having preference and priority over the mortgage liens of complainant described in findings 6, 8, 10, 12 and 14 hereof, and referred to in these conclusions, by virtue of the deferment of payment of the unpaid property taxes assessed on said properties for the fiscal years 1928-29 to 1934-35, inclusive, pursuant to Law No. 23 of the Legislature of Puerto Rico, approved July 16, 1936, as amended by Law No. 122, approved May 13, 1937; nor did The People of Puerto Rico acquire a superior lien having preference and priority over said mortgage liens by virtue of the deferment of the payment of the real property taxes assessed on said properties for the fiscal years 1928-29 to 1932-33, inclusive, pursuant to Law No. 10 of said Legislature approved August 19, 1933.

16, 1936; Appendix III, *infra*, pp. 52-53; 50, 52), without any argument or discussion in the present case,[12] the District Court was manifestly simply following its own earlier rulings in the *Federal Land Bank* cases, February 27, and March 10, of the same year 1939 (Appendix I, *infra*, pp. 38-41, and 36-38), appeals from which were then pending, undecided, in the Circuit Court of Appeals for the First Circuit [filed there May 1, 1939; Appendix I, *infra*, p. 35].

It is not conceivable that either the Judge of the District Court or the parties did not have the pendency of those *Federal Land Bank* cases in the Circuit Court of Appeals in mind, at the time of the entry of the foreclosure decree in this case. The Act of the Legislature authorizing deferment of past due real estate taxes, and preserving the government's priority in the lien of the deferred taxes, was an important statute of wide application. The District Court itself had held it invalid in those *Federal Land Bank* cases as in violation of the federal Constitution and the federal Organic Act,—as impairing the obligation of the mortgage contracts. It does not appear that any other court had ever challenged the validity of the statute. The District Judge had, himself, under the old practice then still in force in Puerto Rico,[13] necessarily allowed the appeals in both those cases by his orders, as appears from the certified copy of the transcript of the record in those *Federal Land Bank* cases in the Circuit Court of Appeals, filed in this Court with this Petition for Certiorari [Order, March 22, 1939, Transcript, p. 25; Order, March 22, 1939, Transcript, p. 59, in the two cases, respectively].

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[12] "Conclusions of Law", R. 72-73, quoted, *ante*, Footnote 11.

[13] The Federal Rules of Civil Procedure did not go into force in Puerto Rico until March 1, 1940 [Act of Congress of February 12, 1940, Public 414, 76th Congress, effective March 1, 1940, c. 25, 54 Stat. 22, extending the Rules of Civil Procedure to the United States District Court for Puerto Rico.

E. In that situation, in view of the fact that this important question of federal law was then pending undecided in the Circuit Court of Appeals upon the appeals from the District Court's own decisions in the *Federal Land Bank* cases, and that a reversal of his decisions in those cases, and an upholding of the statute by the Circuit Court of Appeals, would necessarily vitally affect the decree in the present case, **it was the plain duty of the District Court to reserve power to modify the decree in case of such reversal,** so as to be able to conform, in that event, to the statutory law of Puerto Rico [*Confer, Omaha El & P. Co.* vs. *City of Omaha,* 216 Fed. 848, 851, 856 (C.C.A.-8); *United States* vs. *Reed,* (C.C.A.-2), 274 Fed. 724; *United States* vs. *Harris,* (C.C.A.-8), 286 Fed. 910.]

F. In view of those circumstances, and of the District Court's then existing duty in that regard, the insertion in the foreclosure decree of the last sentence of the concluding paragraph, here in question, expressly directing that "the present term of this court is continued",

> "For the purpose of making any further order or decree in relation to any matter arising in connection with this decree",

appears to have been very proper and fitting, and an effective way to effectuate that purpose, and to reserve to the District Court the power at its succeeding term to conform its decree to the ultimate decision of the Circuit Court of Appeals as to the validity of the Puerto Rican statute.

G. That such was actually the intention of that reservation, as it was understood by the parties at the time of the entry of the foreclosure decree, appears to be strongly indicated by the fact that The People of Puerto Rico did not take any appeal from that decree.

Except for such an understanding, at that time, of the purpose and effect of that reservation, it appears to be inconceivable that an appeal would not have been taken

by The People in such an important case involving such a substantial amount of the public revenue. On the other hand, in view of that understanding of the purpose and effect of this reservation in the decree, there would seem to have been no reason for an appeal at that time, simply to duplicate the question already before the Circuit Court of Appeals in the *Federal Land Bank* cases.

POINT II

The District Court's own interpretation of its decree, at a subsequent term, carries no especial weight.

A. The Circuit Court of Appeals relies (R. 116-117; 116 F. (2d) at p. 381) on the District Court's own interpretation of the foreclosure decree, in the District Court's order of January 31, 1940 (R. 89) denying the petition for reconsideration. The Circuit Court says: "We accept the District Court's interpretation of its own decree". But, manifestly, after the end of May term, 1939, at which the decree was entered, the District Court either (a) retained power over it; or else (b) it did not. If it did; then, plainly, it was its duty so to modify it as to make it conform to the statute of Puerto Rico whose validity had been established by the decision of the Circuit Court of Appeals in the *Federal Land Bank* cases. If it did not; then its interpretation of its own former decree at a former term is entitled to no more weight than is that of any other competent lawyer, or of any one of the parties to the case. This seems plain.

B. The District Court's interpretation is not supported by the language of the decree; particularly in view of the circumstances under which the decree was entered, as above outlined. The District Court in stating its opinion in its order of January 31, 1940, denying reconsideration, says simply (R. 89):

> "Such a decree is clearly a final one for it determines the rights of the parties so that nothing is left to be done but the execution of its provisions. Affirm-

> ance of such a decree by the appellate court would end the suit and execution of the provisions thereof by this court would be all that remained to be done. *The reservation in the decree for further directions simply related to such execution and cannot be availed of as rendering it less final or as leaving open points expressly decided by it at the time it was entered.* (*Italics supplied*)

C. But this interpretation,—if it is to be understood as relating to the final sentence of the decree, above quoted (*ante*, pp. 4, 22),—really does violence to the language of the reservation, as well as ignoring the circumstances under which it was inserted in the foreclosure decree. It overlooks the fact that the last sentence of the paragraph "O" does not on its face refer back to the first sentence at all, but appears to be independent and intended to deal with something else.

D. The first sentence, on the other hand, appears to be complete in itself, and not to need anything added to it, so far as relates to the execution of the decree. It provides in quite usual form, that,

> "All questions, issues, matters and things not hereby disposed of are hereby reserved by the court for its further adjudication,"

and further, likewise in quite usual form,

> "and any party to this cause may at any time apply to the court for further relief at the foot of this decree in respect of any matters not herein specifically provided for".

Thus those two clauses of the first sentence comprise in themselves,—and complete,—all the usual and necessary provisions for reserving to the court the power to give further directions in relation to the execution of the decree,—the kind of reservation with relation to which the Circuit Court of Appeals for the Second Circuit said in one of the cases cited in the opinion of the Circuit Court of Appeals in the present case (R. 117; the case of

American Eng. Co. vs. *Metropolitan By-Products Co.*, 275 Fed. 40, 42):

> "But leave to apply at the foot of the decree for further relief is very usual, and does not prevent the decree from being final, or the order being appealable."

That kind of reservation is one thing. It is usual; and it was embodied in the first sentence of paragraph "O" of the foreclosure decree in this case (R. 85). That sentence is complete in itself; nothing needed to be added to it, to accomplish its purpose.

E. Then what is the meaning of the *unusual* provision contained in the final sentence inserted in the present decree, following that quite usual provision which had already been made in the first sentence? Can this unusual final sentence simply be disregarded as meaningless, and as not adding anything whatever to the usual reservation contained in the first sentence of the paragraph? That is the way the District Court treated it, in its interpretation as above quoted. And the Circuit Court of Appeals followed the District Court here. But must it not be interpreted as intended to mean something? And if so, in view of the circumstances under which it was entered, must it not be construed as intending to mean,—exactly and literally what it says,—that the "present term" is "continued", "For the purpose of making any further order or decree *in relation to any matter arising in connection with this decree*"?

F. That is a wholly different matter from the customary reservation embodied in the first sentence of the paragraph. This final sentence is unusual. It must have been intended to mean something. It is well fitted to enable the District Court to retain the power over the decree which was necessary to enable it to do its plain

duty [14] to modify the decree in the event that the Puerto Rico statute should ultimately be sustained by the Circuit Court of Appeals in the then pending *Federal Land Bank* cases.

G. It is believed that effect should be given to it; and that it should be interpreted, in accordance with its plain language, to have this effect, and to reserve the necessary power to the District Court.

POINT III

The cases cited by the Circuit Court of Appeals are not to the contrary.

The Circuit Court of Appeals says with reference to the District Court's narrow interpretation (*ante*, pp. 23-24; order of January 31, 1940, R. 89) of the final sentence of paragraph "O" of the foreclosure decree, that (R. 116; 116 F. (2d) at p. 381):

> "Somewhat similar phraseology in decrees in other cases has been similarly interpreted",

citing the cases already listed (*ante*, Footnote 8, p. 12).

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[14] The Circuit Court of Appeals for the Eighth Circuit said in relation to a case where its interpretation of a franchise had been overruled by a decision of this Court interpreting the same franchise in other litigation (*Omaha El. & P. Co.* vs. *City of Omaha, supra*, 216 Fed. 848, 851, 856):

> "If we have the power to revise our decree and issue a mandate in harmony with that of the Supreme Court, *it is plainly our duty to do so.* Thus we should not only protect the rights of the plaintiff as a litigant, but *as a matter of public policy* to preserve the orderly administration of justice and avoid an unseemly conflict of judicial mandate (at p. 851). * * *
>
> "* * * Certainly our duty is plain. We ought to harmonize our decree and mandate with that of the Supreme Court" (at p. 856). (*Italics supplied*)

See also: *John Simmons Co.* vs. *Grier Bros. Co.*, 258 U. S. 82, 91-92.

But those cases do not bear the Circuit Court of Appeals out in this respect. They are all cases, simply, of the usual reservation of a right to the parties to apply at the foot of the decree for further relief or directions in relation to carrying the decree into execution. *None of them relates to a provision such as that here involved,* in the final sentence of the present foreclosure decree, continuing the term,—or making any reservation of power generally,—as is here done, "For the purpose of * * * *any matter arising in connection with this decree*". Nothing of the kind whatever.

Thus, for example, in *Mayer* vs. *White, supra,* 12 F. (2d) 710, the reservation was simply (at p. 113):

> "The court reserves jurisdiction of this cause for the making of such orders as the continuing preservation of the property and the protection of the parties may require."

That reservation was held (at pp. 713-715) not sufficient to authorize opening up that portion of the decree which had definitely fixed the amount to be paid to one party thereunder, and had made it a charge on his interest in the partnership property.

The reservations in the decrees in *Lewisburg Bank* vs. *Sheffey,* 140 U. S. 445, 449, 452, and in *American Engineering Co.* vs. *Metropolitan By-Products Co.,* 275 Fed. 40, 42, cited by the Circuit Court of Appeals, were simply in the usual form reserving the power to give further directions or orders in the execution of the decree. [*Confer, ante,* p. 25, quotation from the *American Engineering Co.* vs. *Metropolitan By-Products Co.* opinion]. The case of *Kiehn* vs. *Dodge County,* 19 F. (2d) 503, likewise cited, (R. 117; 116 F. (2d) at p. 381) appears not to be in point at all. In that case the Circuit Court of Appeals for the Eighth Circuit simply held (at p. 504) that the judgments in which were contained the reservation, there sought to be relied upon, were not the final judgments in the case at

all; but that other judgments, later entered, were really the final judgments in the case.

POINT IV

"Error apparent" on the face of the foreclosure decree.

A. There is, on the face of the foreclosure decree itself, "error apparent" within the meaning of Lord Bacon's First Ordinance in Chancery; since, upon the face of the decree itself, it appears that it is in "violation of some statutory enactment",—viz., of the Puerto Rican statute of July 16, 1936, Section 5 (Appendix III, *infra*, pp. 52-53), which expressly gives priority to the deferred real estate taxes. *Hoffman* vs. *Knox*, 50 Fed. 484, 490 [15] (*Fuller, Ch. J.*, sitting at the Circuit); citing 2 Daniell, Ch. Pr. (5th Ed.) *1577; *Perry* vs. *Phelips*, 17 Ves. *174, *177 (*Lord Eldon*); Story, Eq. Pl., Sec. 405.

CHIEF JUSTICE FULLER said (*Hoffman* vs. *Knox, supra*, 50 Fed. at p. 490):

> "To sustain a bill of review for error of law apparent, the decree complained of must be '*contrary to some statutory enactment*, or some principle or rule of law or equity recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the court.' 2 Daniell, Ch. Pr. (5th Ed.) *1577. The general rule is that such a bill does not lie to correct a mere error, which would, in effect, render it nothing more than a substitute for an appeal." (*Italics supplied*)

So likewise JUDGE SANBORN afterwards said in *Hill* vs. *Phelps* (8th Circuit) 101 Fed. 650, 652:

> "The error of law which will maintain a bill of review *must consist in the violation of some statutory*

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[15] One of the cases cited here by the Circuit Court of Appeals itself; R. 116; 116 F. (2d) at p. 380.

enactment, or some recognized principle or rule of law or equity, or of the settled practice of the court". (*Italics supplied*)

In the same opinion he had earlier said (*ib.*, at p. 651):

"The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the the decree; and (3) newly-discovered evidence which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered. No departure has ever been made from the rules applicable to such a bill, which were declared by LORD CHANCELLOR BACON, in the first of his ordinances in chancery, in these words:

'No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to life after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.' "

B. While the occasions for bills of review for "error apparent" are rare, and in most of the instances in which review in that manner has been sought it appears that the case was not really a proper one for a bill of review,[16] yet

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[16] *Confer* the frequent citations of *Hoffman* vs. *Knox* and the cases following it, in State as well as federal courts, listed in Shepard's Citations. And *Confer*, also, *John Simmons Co.* vs. *Grier Bros. Co., supra,* 258 U. S. 82, 91-92.

the rule has never been questioned, nor that "the violation of some statutory requirement" is a ground for a bill of review, without leave of court.

C. In the present case there exists the direct violation of the statutory requirement; and the violation is apparent on the face of the foreclosure decree. As hereinbefore pointed out, it appears on the face of the decree that the District Court deliberately refused to obey the Puerto Rican statute as to the deferred tax priority. The District Court's only authority for this was its own prior decisions, a few months earlier, in the *Federal Land Bank* cases; which were then pending on appeal, undecided, in the Circuit Court of Appeals for the First Circuit; and in which, shortly afterwards, the District Court was overruled [*ante*, pp. 4-5]. This direct violation of a statutory requirement is within the exact definition of the grounds for a bill of review as laid down in all the books.[17]

D. Plainly the motion for reconsideration of the foreclosure decree, filed by The People of Puerto Rico (R. 86) promptly upon the Circuit Court of Appeals' reversal of the District Court's judgments in the *Federal Land Bank* cases, **and likewise its renewal by the objections** to the approval of the receiver's final report and his discharge (R. 98-99), may be considered as, in effect, a bill of review, or as a petition in the nature of a bill of review, and, in that light, as invoking the undoubted power existing in the District Court to review the foreclosure decree for error apparent on the face of the decree.

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[17] In *Hoffman* vs. *Knox, supra*, CHIEF JUSTICE FULLER held (50 Fed. *supra*, at pp. 490-492) that *the converse of this situation*,—the fact that the decree there had followed and obeyed a State statute which the State Supreme Court later on held to be unconstitutional and invalid,—was not within the rule, and was not in itself sufficient ground for a bill of review. But it is noteworthy that, even in that reversed situation, the Chief Justice put his opinion, partially at least, upon the ground that the as-

POINT V

There was likewise "error apparent" on the face of the District Court's order of January 31, 1940, in holding the Puerto Rican statute of July 16, 1936, not applicable to this case.

As hereinbefore pointed out, the District Court, as a second ground for denying petitioner's motion for reconsideration of the foreclosure decree, held (R. 90-91) that the Act of July 16, 1936 (Appendix III, *infra*, pp. 51-55) was not applicable to this case, and that it did not provide priority for the deferred taxes here. The District Court there erroneously held that the Act of August 24, 1933 (Appendix III, *infra*, pp. 50-51) was still in force and governed the relative priorities of the taxes and the mortgages on October 20, 1936, the date the receiver went into possession. **The District Court's error, in thus holding the earlier Act of August 24, 1933, applicable, plainly appears on the face of the order itself.** The order says (R. 90) that **October 20, 1936,** is the date the receiver went into possession of the property. As hereinbefore pointed out (*ante*, pp. 6-8), **on that date the Act of July 16, 1936, enacted more than three months previously, had already taken effect,** immediately on its enactment, under its emergency clause (Sec. 17, Appendix

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sailing bondholders had really assented to the decree, and that (50 Fed. at p. 491): "It is a general rule that a bill of review will not lie to impeach a consent decree".

That reversed situation,—the court's *obedience* to an afterwards questioned statute,—is, however, *a very different thing from* a lower court, as here, *refusing obedience*, and deliberately disregarding a valid statute. If, as here, it is afterwards established by the authority of a higher court that the lower court was wrong in this, it comes pretty close to what is called "jurisdictional error" in the military law. Going so close to trespassing upon the boundary line between the judicial and the legislative powers, it would seem that **comity between the two powers,** and the orderly administration of government, would require the enforcement of the ancient chancery ordinance of Lord Bacon, allowing the opening up of such a decree, for "error apparent."

III, *infra*, p. 55). Even in the absence of the emergency clause it would still have gone into effect on October 14, 1936 [six days before the receiver's appointment] in regular course, ninety days after its enactment, under the provisions the sixth paragraph of Section 34 of the Organic Act for Puerto Rico (Act of March 2, 1917, c. 145, 39 Stat. 951, 961). The District Court's error is manifest. It is clearly "error apparent" on the face of the order.

POINT VI

In conclusion.

On the whole record it appears that there is here a plain disregard by the District Court of the provisions of a valid statute of Puerto Rico, the Act of July 16, 1936, which expressly secured priority to the deferred real estate taxes. The taxes had been deferred by the Treasurer, under the provisions of that Act, upon the applications of the receiver acting under the directions of the District Court itself. By the disregard of that statute a substantial amount of the public revenue of the Government of Puerto Rico has been withheld from its Treasury. The foreclosure decree of September 18, 1939, at the May term, was plainly erroneous, and contained "error apparent" on its face in respect of this violation of the statute. Both because of this error apparent on its face, and also because of the power reserved by the final sentence of the last paragraph "O" of the decree continuing the term for the purpose of "making any further order or decree in relation to any matter arising in connection with this decree", the District Court possessed, at the following term, the November term,—and throughout the whole of that term,—the power to correct this plain error. Possessing that power, the District Court should have exercised it; and should have corrected the foreclosure decree in this respect, either upon petitioner's motion for recon-

sideration filed promptly after the announcement of the Circuit Court of Appeals' decision sustaining the validity of the statute, or else upon the objections of the petitioner, at the same November term, to the approval of the receiver's final report and the receiver's discharge.[18] The District Court's disregard of the statute, in the foreclosure decree, and its refusal to correct the decree afterwards at the following term when it still possessed the power to do so, and after its plain error had been called to its attention, constituted such a violation of the plain statutory law of Puerto Rico, and such an injury to the public Treasury, and such a departure from the accepted

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[18] The Circuit Court of Appeals says, as above quoted (*ante*, pp. 12-13; R. 118; 116 F. (2d) at p. 381), that:

> "* * * the relative priorities of the Bank and the insular government in the mortgaged properties were determined by the decree of September 18, 1939, and had become *res judicata*. These issues could not be raised again at the later stage in the receivership when the court was considering whether to approve the receiver's final report." (*Citing the cases listed in footnote* 9, *ante*, p. 13).

The cases the Circuit Court cites go, however, only to the one point that, after the expiration of the term at which a final decree or judgment is entered, the court [in the absence of any reservation of jurisdiction in the decree, and in the absence of any "error apparent" on its face] loses control over it, and may not modify it at a subsequent term.

It is not believed that the Circuit Court of Appeals meant to intimate that the mere fact that the question was raised in the present instance by the petitioner here upon objections to the approval of the receiver's final report made, in itself, any difference in the court's jurisdiction. The cases it cites make no reference to anything of that kind. Manifestly, if the District Court possessed the power, at the November term, to reconsider the ques-

and usual course of judicial proceedings,—and the Circuit Court of Appeals' affirmance of the District Court's orders in this respect constituted such a sanctioning of such error and of such departure by the lower court,—as to call for an exercise of this Court's power of supervision by the issuance of the writ of certiorari in this case.

Respectfully submitted,

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Of Counsel.

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tion of the tax priorities as fixed in the foreclosure decree at the preceding term, then *it possessed that power during the whole of the November term;* and, so far as the court's jurisdiction was concerned, it was immaterial whether its exercise was invoked by the petitioner upon the objections to the receiver's final report, or upon any other motion. The petitioner thought it fitting to invoke it by objections to the approval of the receiver's final report, because that apparently was substantially the end of the litigation in the District Court; and was, of course, still at the November term, 1939, the term immediately following the May term at which the foreclosure decree had been entered, and while the parties were still before the court and subject to its jurisdiction.

APPENDICES

APPENDIX I

OPINIONS OF DISTRICT COURT IN FEDERAL LAND BANK CASES [19]

TRANSCRIPT OF RECORD OF DISTRICT COURT

[Filed in Circuit Court of Appeals May 1, 1939]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR PUERTO RICO

In Equity No. 2229.

THE FEDERAL LAND BANK OF BALTIMORE,
Complainant,

v.

DOMINGA TIRADO, JOHN DOE and RICHARD ROE, THE UNITED STATES OF AMERICA, BANCO POPULAR de PUERTO RICO, RECEIVER for BANCO TERRITORIAL Y AGRICOLA de PUERTO RICO, and CREDITO Y AHORRO PONCENO, Defendants.

FORECLOSURE OF MORTGAGE

[Removed from the District Court of San Juan, Civil No. 27,741.]

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[19] Printed Transcript of the Record in the Circuit Court of Appeals for the First Circuit, filed there on May 1, 1939, upon appeal of the *Federal Land Bank* cases to that court. Cases Nos. 3458 and 3459 in the Circuit Court of Appeals. [Certified copy filed in this court with this Petition for Certiorari, as stated (*ante*, p. 3; Footnote 2) in the Petition.]

* * * * *

ORDER TO CANCEL ATTACHMENT FOR EXTENDED TAXES [pp. 22-24].
[Filed March 10, 1939]

This cause came up to be heard upon the motion for rule to show cause filed by the complainant, The Federal Land Bank of Baltimore, for the cancellation of an attachment levied by the People of Puerto Rico, for the collection of extended taxes, which attachment encumbers the farm mortgaged to the complainant by a deed executed and recorded prior to the date of the Act of the Legislature of Puerto Rico of 1936, which act extended the payment of past due taxes and created a prior lien in favor of such taxes; when prior to the passage of the said act the only lien reserved in favor of the People of Puerto Rico for taxes was limited to taxes for the current year and the three preceding fiscal years.

When the said motion for rule to show cause was filed, the farm above referred to had been sold at public auction, in the above entitled foreclosure proceedings, to the complainant, The Federal Land Bank of Baltimore, which party became aware of the tax lien aforementioned, upon the recordation of its deed of sale, since the attachment was not recorded till some time after the above foreclosure proceedings had been instituted.

On the date and hour set by this court in the rule to show cause directed to the People of Puerto Rico, both the complainant and the People of Puerto Rico, were represented by counsel. At the said hearing the counsel for the People of Puerto Rico objected to the cancellation of its attachment on the ground that the act of the Legislature of Puerto Rico authorizing the extension for the payment of past due taxes, expressly provided that taxes thus extended would constitute a lien which would have preference and priority to any other lien constituted after or prior to the date of the extension. The counsel for The Federal Land Bank of Baltimore, although admitting the terms of the provisions of the said act as expressed by

counsel for the People of Puerto Rico, yet raised the question that said act of the Legislature of Puerto Rico was unconstitutional as contrary to the terms of the Organic Act of Puerto Rico, which prohibits the Legislature of passing any law which will impair the obligation of contracts.

Exactly the same question between the same parties here involved had been submitted to this court in the case of The Federal Land Bank of Baltimore *v.* Emiliano Torres Garcia, et als., Equity No. 2284, and both parties agreed in the above entitled cause, to submit this matter under the same arguments and briefs to be filed in the other case hereinbefore referred to.

Now, therefore, under the same conclusions of law expressed by this court in the order to cancel attachments for extended taxes entered on February 27, 1939, in the case of the Federal Land Bank of Baltimore *v.* Emiliano Torres Garcia, et als., Equity No. 2284, this court hereby orders, adjudges and decrees:

That complainant's mortgage and the title acquired in consequence thereto, has priority and preference to the attachment in favor of the People of Puerto Rico for past due extended taxes, and that the only lien for taxes in favor of The People of Puerto Rico, which has priority to complainant's mortgage is for such taxes for the current year and the three preceding fiscal years; yet the complainant, The Federal Land Bank of Baltimore, is liable to the People of Puerto Rico for the payment of taxes on the said farm due and not paid for the current year, at the date of the sale and the three preceding fiscal years, as well as any subsequent taxes.

The Registrar of Property of Guayama, P. R., is hereby ordered and directed to cancel in the books of the registry under his charge, the attachment hereinbefore referred to, as is more specifically set forth in the complainant's motion for rule to show cause.

The clerk of this court shall issue writ of cancellation

to the said Registrar of Property at the written request of the complainant.

Done and ordered at San Juan, Puerto Rico, on March 10, 1939.

ROBT. A. COOPER,
United States District Judge.

TRANSCRIPT OF RECORD OF DISTRICT COURT
[Filed in Circuit Court of Appeals May 1, 1939]

IN THE DISTRICT COURT OF THE UNITED STATES FOR PUERTO RICO.

In Equity No. 2284.

THE FEDERAL LAND BANK OF BALTIMORE,
Complainant,

v.

EMILIANO TORRES GARCIA AND HERMINIO TORRES RUIZ, AND AURELIA RUIZ,
Defendants.

FORECLOSURE OF MORTGAGE.

*****

ORDER TO CANCEL ATTACHMENTS FOR EXTENDED TAXES [pp. 48-50]
[Filed February 27, 1939.]

This cause came up to be heard upon the motion for

rule to show cause filed by the complainant, The Federal Land Bank of Baltimore, for the cancellation of two attachments levied by the People of Puerto Rico for the collection of extended taxes, which attachments encumber two of the three farms mortgaged to the complainant by a deed executed and recorded prior to the date of the Act of the Legislature of Puerto Rico of 1936, which extended the payment of past due taxes and created a prior lien in favor of such taxes, when prior to the passage of the said act the only lien reserved in favor of the People of Puerto Rico for taxes was limited to taxes for the current year and the three preceding fiscal years.

When the said motion for rule to show cause was filed, the three farms above referred to had been sold, at public auction, in the above entitled foreclosure proceedings, to the complainant, The Federal Land Bank of Baltimore, which party became aware of the tax liens aforementioned, upon the recordation of its deed of sale; since the attachments were not recorded till some time after the above foreclosure proceedings had been instituted.

The sole question presented in this case is accurately stated in the briefs filed by both complainant and the People of Puerto Rico. The issue in this case may be stated as follows: has the Legislature of Puerto Rico the power, by extending past due taxes, to declare that taxes so extended shall constitute a lien prior to a mortgage which, before the Legislation, was a lien prior to all taxes except taxes for the current year and the three preceding fiscal years.

Counsel for the People of Puerto Rico have cited numerous authorities but as I read them none of them are applicable to this case. No one could question the power of the Legislature of Puerto Rico to levy, for any years succeeding the execution of a mortgage, such taxes as the necessities of the Government require, and the taxes so levied would constitute a prior lien. The question here, however, involves the right, by extending the time of pay-

ment of past due taxes, to thereby create a prior lien, in favor of such taxes, which did not exist before. This I am satisfied they can not do as it would be a violation of the terms of the Organic Act which prohibits the Legislature from passing any law which will impair the obligation of contracts.

There is no doubt but that the Legislature of Puerto Rico has authority to extend the payment of past due taxes and such extension will not deprive the Government of its tax lien as it existed at the time of extension. The act extending taxes and creating a prior lien for the collection thereof would be good as against any mortgage executed subsequently to the passage of such act. What I mean to hold in this case is that taxes, which were past due at the time the Act of 1936 was passed, and were thereby extended, and which had lost as against a mortgagee, the prior lien originally given, can not now by being extended over a period of years be given a lien superior to the mortgage executed before the Act was passed. . . .

The complainant is entitled to an order directing the Registrar of Property to cancel the attachments referred to in its motion; yet such cancellation does not relieve the complainant from its liability to the People of Puerto Rico for the payment of taxes on said properties accrued and not paid for the current year, at the date of the sale, and the three preceding fiscal years, as well as any subsequent taxes.

Therefore, it is hereby ordered, adjudged and decreed that complainant's mortgage, and the title acquired in consequence thereto, has priority and preference to the attachments in favor of the People of Puerto Rico for past due extended taxes, and that the only lien for taxes in favor of the People of Puerto Rico which has priority to complainant's mortgage is for such taxes for the current year and the three preceding fiscal years.

The Registrar of Property of Mayaguez is hereby or-

dered and directed to cancel in the books of the registry under his charge, the attachments hereinbefore referred to.

The clerk of this court shall issue writ of cancellation to the said Registrar of Property at the written request of the complainant.

Done and ordered at San Juan, Puerto Rico, this twenty-seventh day of February, 1939.

ROBT. A. COOPER,
United States District Judge.

APPENDIX II

OPINION OF CIRCUIT COURT OF APPEALS, FIRST CIRCUIT; 108 F. (2d) 275, *et seq.*

OCTOBER TERM, 1939

No. 3458.

THE PEOPLE OF PUERTO RICO,
APPELLANT,
v.
FEDERAL LAND BANK OF BALTIMORE,
PLAINTIFF, APPELLEE.

No. 3459.

SAME *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR PUERTO RICO.

BEFORE WILSON, MAGRUDER AND MCLELLAN, JJ.

OPINION OF THE COURT.

December 15, 1939.

MAGRUDER, J. The plaintiff bank in these two cases became the holder of real estate mortgages given to secure long-term loans. At the times when the bank acquired these security interests, 1928 in the first case and 1925 in the second, Puerto Rico had an unusual provision of law relating to liens for real estate taxes. Section 315 of the Political Code provided:

"... The tax that is assessed for the current fiscal year, and for the three prior fiscal years, against each piece or parcel of real property, including any improvements that may be thereon, or that may be subsequently placed thereon, shall constitute the first lien thereon, and shall be prior to all other liens whatsoever on said property, whether the said liens attach before or after the lien of said taxes: ..."

As the law then stood, this prior lien would lapse after

a tax had been more than three years in arrears, which tended to bring about a rather prompt collection of taxes, by tax sales if necessary. Depressed economic conditions prompted the passage of the **Act of July 16, 1936,** which authorized the Treasurer of the Island, upon application by any taxpayer owing real estate taxes for 1934-1935 or preceding years, to defer the collection of such taxes and extend the time for payments thereon over a period of twenty years in equal annual installments. Section 5 of this Act reads:

"The amount of the deferred-tax receipts issued under this Act shall constitute a preferred lien on the property subject to the unpaid and deferred tax. This lien shall have preference and priority over any other lien which already burdens or may be hereafter constituted on said properties. The term of duration of this lien for taxes levied on real property, which is established by Section 315 of the Political Code, . . . is extended for a period of twenty (20) years and shall not be extinguished until the deferred taxes and the interest thereon have been totally paid; . . ."

In 1937 the bank instituted these suits to foreclose the mortgages above mentioned. Jurisdiction in the federal district court was based upon the Act of June 16, 1933, 48 Stat. 184, 12 U. S. C. §632. The People of Puerto Rico levied attachments on the mortgaged properties, to cover installments due on "extended" taxes. After decreeing foreclosure and sale to satisfy the claims of the plaintiff bank, the court, on motion of the bank, ordered the People of Puerto Rico to show cause why the attachments for extended taxes should not be cancelled. After hearing, the court decreed in each case that such attachments should be cancelled and "that the only lien for taxes in favor of the People of Puerto Rico which has priority to complainant's mortgage is for taxes for the current year and the three preceding fiscal years." These are the decrees now appealed from.

The District Court thought that the Act of 1936 was invalid as "a violation of the terms of the Organic Act which prohibits the Legislature from passing any law which would impair the obligation of contracts." 48 U. S. C. §737.

We believe that the Act is valid and that the attachments for extended taxes take priority over the mortgages held by the bank. [*Emphasis supplied*]

There has been no impairment of the obligation of contract. In each case the obligation of the debtor to pay off the mortgage note in the installments originally specified remains unimpaired, and the full interest of the mortgagor in the property remains pledged to the fulfillment of this obligation. But the mortgagor's interest was always subject to the paramount taxing power of the Territory. *Baldwin* v. *Moroney*, 173 Ind. 574, 583-84, 91 N. E. 3, 7. A lien for taxes attaches to the land itself, irrespective of whatever subdivision of beneficial or security interests may exist therein.

Appellee concedes that its vested mortgage interest may, even by subsequent legislation, be subordinated to a lien for taxes levied on the land, where the lien is established in support of taxes imposed and accruing from and after the date of such legislation. *Wabash E. Ry. Co.* v. *Commissioners*, 134 Ill. 384, 25 N. E. 781; *German Savings & Loan Society* v. *Ramish*, 138 Cal. 120, 124-125; *Murphy* v. *Beard*, 138 Ind. 560, 38 N. E. 33; see *Provident Institution for Savings* v. *Mayor and Aldermen*, 113 U. S. 506, 514-16; Note, 30 L.R.A. (N.S.) 762. We decided nothing to the contrary in *Domenech* v. *Lee*, 66 F. (2d) 31, which related to excise taxes, not taxes on real estate. It is contended, however, that the legislature cannot, to the prejudice of pre-existing mortgage interests, create a new tax lien or revive an expired one, in support of past-due taxes levied on the land. In our opinion the taxing power is not subject to this limitation. The needs of revenue are served by the collection of delinquent taxes

as well as by the collection of current taxes.

The records in the cases at bar do not indicate what years are covered by the attachments for extended taxes involved in this appeal. If they were for the fiscal year 1934-1935, and perhaps also for the fiscal year 1933-1934, then at the time the taxes were extended the old prior liens given by Section 315 of the Political Code were still valid and subsisting. As to them, the legislature could without question say, as it did in the Act of 1936: "We might enforce these liens now in preference to all other outstanding interests, but to avoid oppressive tax sales in these hard times we shall give the taxpayer the option to apply for a twenty-year extension of the taxes so secured, in which case the liens instead of lapsing within three years shall be extended until the deferred taxes have been paid."

We think the Act of 1936 is equally valid as applied to extended taxes for years as to which the old three-year lien had already lapsed.

Let us assume that the taxpayer failed to pay the taxes assessed for the fiscal year 1931-1932. At the time those taxes accrued and for three years thereafter they constituted a lien on the mortgaged property superior to the lien of the bank. As a matter of indulgence, the tax collector refrained from enforcing the liens. As a matter of grace, the legislature prescribed that the People of Puerto Rico would not insist upon a preference over the outstanding mortgagee's interest for more than three years after the taxes became due. But the mortgagee, whose interest was at all times subordinate to the taxing power, had no vested right to a continuation of this indulgence and of this legislative grace. The Territory has made no contract not to change the lien provisions of the Political Code, Section 315.

Admittedly the legislature in 1930 (which was after the mortgages were executed) could have enacted that real estate taxes assessed for 1931-1932, and thereafter, should

constitute a prior lien on the land, the lien to subsist, not for three years only, but for an indefinite time until the taxes are fully paid. Such a law could not have been successfully challenged, despite the fact that it would have extended the lien for future taxes to the disadvantage of mortgage interests acquired before its passage. We cannot see that it makes any constitutional difference whether the legislature extends the period of the lien before the taxes have accrued, or extends or revives the lien as against the mortgagee after the taxes have accrued. In either case there would come a time, in our assumed case of delinquency for 1931-1932, when the mortgagee would have been freed of the lien, had the law remained as it was when the mortgage was executed; but if, in one case, the legislature by a law passed subsequent to the execution of the mortgage could make the lien available to the Government after the three-year period, so it could in the other. In the one case the bank has not changed its position in reliance on a prospective lapse of the lien for 1931-1932 taxes; in the other, it has not changed its position in reliance upon an accrued lapse. It probably would not alter the result if it had, because the bank is not entitled to assume that the law will remain unchanged. In either case, the legislature is making a reasonable exercise of the taxing power to see to it that each parcel of land bears its fair proportion of the tax burden.

Viewing the matter from another standpoint, the conclusion we have reached is reinforced. The Act of 1936 speaks of extending past-due taxes. The legislature could have accomplished the same result if it had enacted (1) that no further effort will be made to collect unpaid taxes for 1934-1935 and years previous, but (2) that for each of the next twenty years, over and above the annual levies imposed on all land, there shall be superadded a special tax equal to one twentieth of the past delinquencies, with interest. This being a new tax imposed and accruing after the passage of the legislation, the legislature to secure

its collection might lawfully create a lien of indefinite duration superseding existing mortgage interests, provided the tax itself would be valid under the due-process clause.

There could be no doubt of the validity of such an additional tax. It would be levied only on land which in the past has not borne its proportionate share of the tax burden; this fact would justify the classification. *Florida Central R. R. Co.* v. *Reynolds,* 183 U. S. 471; *Seattle* v. *Kelleher,* 195 U. S. 351. In the *Reynolds* case the court upheld a state statute passed in 1885 providing that if any railroad property was not assessed for taxes for the years 1879, 1880 and 1881, it should be the duty of the Comptroller "to cause the same . . . to be assessed for state and county taxes, and 20 per centum of the taxes so assessed for said years and now unpaid shall be collected at the same time the taxes for the year 1885 shall be assessed and collected, and each year thereafter an additional 20 per centum of said taxes shall be collected at the same time and in the same manner as the taxes for such year are collected, until the whole amount of said unpaid taxes for the years 1879, 1880 and 1881 are paid." In the *Kelleher* case a street was opened up and a special assessment levied by the city. This assessment was held void. Later a parcel of land, benefited by the improvement, was sold, then mortgaged, then bought in by the plaintiff on foreclosure. Subsequently a statute was passed authorizing a new assessment upon the lands benefited. A "reassessment" was ordered by city ordinance. This assessment was held valid, it being no objection that it was levied "upon an executed consideration," nor that such assessment included items which under the earlier law were required to be paid for out of general taxation. The benefit had been received, and the land became subject to special assessment therefor under a future exercise of the taxing power. It did not matter that the present owner acquired his title after the earlier assessment

had been held void and before the later enabling act was passed.[1]

Whether the legislature chooses to call the tax an extension of past-due taxes, or an additional levy predicated upon the fact that the land in question had in the past received the general benefit of governmental protectection without having borne its share of the burden, is a mere matter of form, and certainly cannot be decisive of the validity of the prior lien established by the Act of 1936. The legislature has made a valid exercise of the taxing power, and the lien is incidental.

In each case:

The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; appellant recovers costs of appeal.

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[1] The Court said, 195 U. S. at 359, 360: "The charge of planking on the general taxes was not a contract with the land-owners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. . . . " It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning *bona fide* purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice."

APPENDIX III

PUERTO RICO STATUTES

Act No. 10, approved August 19, 1933; Laws of 1933, Special Session, pp. 62-68.

AN ACT

Authorizing the Treasurer of Puerto Rico to Defer the Payment of taxes due and pending collection on real property, or which may have been sold for taxes and may be within the legal period of redemption, for the year 1932-33 and preceding years; determining the manner and conditions for such deferment; extending the term of duration of the preferred lien constituted by the taxes which are hereby deferred; authorizing the Treasurer to borrow money and providing the manner for payment of the interest and to redeem the debt contracted; providing funds for the application of this act; and for other purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—The Treasurer of Puerto Rico is hereby authorized to defer the payment of the taxes due and pending collection on real property in Puerto Rico, for the year 1932-33 and preceding years, in the manner and under the conditions provided in this Act, and subject to the regulations that said Treasurer may prescribe in accordance therewith.

Section 2.—Any taxpayer indebted for taxes on real property for the year 1932-33, or preceding years, may apply to the Treasurer of Puerto Rico to defer the collection of such taxes to be paid in installments in the manner prescribed in this Act; *Provided*, That this Act shall also be applicable to all natural and artificial persons whose properties may have been sold for nonpayment of taxes and adjudicated to The People of Puerto Rico and which may be within the legal period of redemption.

Section 3.—The Treasurer of Puerto Rico, upon application by any taxpayer, may, if he is satisfied of the apparent impossibility of the taxpayer to pay the delinquent taxes, authorize the deferment of the collection of the taxes which said taxpayers may owe on real property for the year 1932-33 and preceding years.

The taxes so deferred shall be paid during a term of ten (10) years, beginning July 1, 1934, by tenths; the instalments shall become due July 1 of each year, and the first instalment shall become due July 1, 1934, and the tenth instalment, July 1, 1944.

Section 5.—The amount of the deferred tax receipts issued under this Act shall constitute a preferred lien on the property subject to the unpaid and deferred tax. This lien shall have preference and priority over any other lien which affects or may hereafter affect said properties, and this lien shall not be cancelled until the deferred taxes and interest thereon, shall have been totally paid.

Section 6.—Any natural or artificial person who may acquire properties, whether by purchase, inheritance, donation or otherwise, which are liable for taxes which have been deferred as provided by this Act, shall be subject to all the obligations and privileges provided by this Act.

Section 14.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 15.—This Act, being of an urgent character, shall take effect immediately after its approval.

Act No. 14, approved August 24, 1933; Laws of 1933, Special Session, pp. 76-78.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—With the exception of the taxes on the encumbered property for three years and for the current year, mortgage credits and crop loans are hereby declared to be liens having preference over any other charge or lien for taxes or for any other cause.

Section 2.—The priority or preference among mortgage credits and crop loans shall be the same as now determined by the laws in force.

Section 3.—It is hereby declared that this Act shall have, and has a retroactive effect as regards charges and liens for taxes due, other than property taxes, and to which, in accordance with the provisions of laws prior hereto, there has been given the character of a preferred lien.

Section 6.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 7.—If any clause, paragraph, article, section, or part of this Act shall be declared unconstitutional * * *.

Section 8.—This Act shall take effect ninety days after its approval.

Act No. 23, approved July 16, 1936; Laws of 1936, Special Session, pp. 160-170.

AN ACT

To authorize the Treasurer of Puerto Rico to defer the payment of taxes on real property that are due and pending payment, including those deferred by Act No. 10, of August 19,1933, as amended by Act No. 30, of May 11, 1934, or on property which may have been sold for taxes and is within the legal term for redemption for the year 1934-35 and preceding years; to determine the form and conditions of said deferment; to constitute a preferred lien for the taxes hereby deferred, which lien extends the period of duration of the preference of the lien established by Section 315 of the Political Code, Sections 1823 and 1824 of the Civil Code, Article 168 of the Mortgage Law and Section 1 of Act No. 14, approved August 24, 1933; to declare in force the attachments made for the collection of these taxes until they are paid; to authorize the treasurer to borrow money and to provide for the manner of paying the interest and of amortizing the debt contracted; to appropriate funds for the application of this act, and for other purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—The Treasurer of Puerto Rico is hereby authorized to defer the payment of the taxes due and pending payment on real property in Puerto Rico, for the year 1934-35 and preceding years, in the manner and under the conditions provided in this Act, and subject to the regulations that said Treasurer may prescribe in accordance herewith.

Section 2.—Any taxpayer indebted for taxes on real property for the year 1934-35 or preceding years may apply to the Treasurer of Puerto Rico to defer the collection of such taxes, to be paid in instalments in the manner prescribed in this Act; *Provided* That this Act shall also be applicable to all natural or artificial persons whose properties may have been sold for nonpayment of taxes and awarded to The People of Puerto Rico, which are not devoted to the service of the federal, insular, or municipal government, and which may be within the legal year of redemption; *Provided, further,* That this Act shall also be applicable to taxpayers whose delinquent taxes have been deferred under Act No. 10, of August 19, 1933, as amended by Act No. 30, of May 11, 1934.

Section 3.—The Treasurer of Puerto Rico, upon the application of any taxpayer may authorize the deferment of the collection of the taxes which said taxpayer owes on real property for the year 1934-35 and preceding years. The taxes so deferred shall be paid during a term of twenty (20) years, beginning April 1, 1937, by twentieths; the instalments shall become due April 1 of each year, and the first instalment shall become due on April 1, 1937, and the twentieth instalment on April 1, 1957.

Section 4.—The collection of each of the tax receipts on real property the taxes on which may be deferred shall be suspended, and the Treasurer of Puerto Rico shall order that the amount of taxes owed on each of such real properties, not including interest, surcharges, fees for attachment proceedings, and expenses for attachment proceedings, and expenses for notices of public sale, shall be made to appear on a new receipt which shall be called a deferred-tax receipt. These deferred-tax receipts shall be divided into twenty sections, to be collected on the dates hereinbefore provided, and shall bear interest at the rate of three (3) per cent per annum counting from April 1, 1936.

Section 5.—The amount of the deferred-tax receipts issued under this Act shall constitute a preferred lien on the property subject to the unpaid and deferred tax. This lien shall have preference and priority over any

other lien which already burdens or may be hereafter constituted on said properties. The term of duration of this lien for taxes levied on real property, which is established by Section 315 of the Political Code, Sections 1823 and 1824 of the Civil Code, Article 168 of the Mortgage Law and Section 1 of Act No. 14, approved August 24, 1933, is extended for a period of twenty '20) years and shall not be extinguished until the deferred taxes and the interest thereon have been totally paid; *Provided,* That attachments recorded in the registries of property for the collection of said taxes shall remain in force until the amount of the deferred taxes covered by the attachment has been paid.

Section 6.—Any natural or artificial person who may acquire properties, whether by purchase, inheritance, donation, or otherwise, which are liable for taxes which have been deferred under this Act, shall be subject to all the obligations and privileges provided by this Act; *Provided,* That in all cases where deferment is granted for the payment of taxes, in accordance with this Act, the Treasurer of Puerto Rico shall proceed to record in the registry of property the preferred lien constituted by Section 5 of this Act, for the purpose that the succeeding acquirers of the said property may be duly notified thereof, and this lien shall be registered by the registrar of property by means of a marginal note on the respective registration of the properties the taxes on which have been deferred.

Section 7.—It shall be optional for any taxpayer who has taken advantage of the provisions of this Act, to pay in advance any part or the whole amount of the deferred-tax receipts before they become due; *Provided,* That in the case of the sale of a property the taxes on which have been deferred, the Treasurer may require the total payment of the receipts if, in his judgment, the purchaser is able to pay.

Section 8.—It shall be an express condition for such deferment as the Treasurer may make of the delinquent taxes of a taxpayer, that the latter shall pay before December 31, 1936, the taxes assessed for the year 1935-36 and for the first semester of the year 1936-37. As a reward for the faithful fulfilment of the contract of deferment, the Treasurer shall divide into twenty (20)

equal parts the whole amount that the taxpayer owes for interest, surcharges, fees for attachment proceedings, and expenses for notices of public sale, at the time of making the deferment, and shall remit the proportional amount of those corresponding to the instalment or instalments of the deferred debt that the taxpayer may have paid.

Section 9.—If any taxpayer whose taxes have been deferred under this Act fails to pay at maturity the taxes that may have been levied for 1935-36 and for the first semester of the year 1936-37, and those for succeeding years, as they fall due, or fails to pay the corresponding part of the receipt for taxes deferred under this Act, when it falls due, the deferred taxes shall be deemed to have become due and the Treasurer shall collect them by means of attachment proceedings as provided by the Political Code, adding to the amount of the taxes deferred and unpaid, the amount for interest, surcharges, fees for attachment proceedings, and the expenses for notices of public sale that the taxpayer may owe at the time of deferment, less the total amount of the taxes deferred and paid that may have been remitted by the Treasurer, as provided in Section 8 of this Act.

Section 10.*****.

Section 14.—Paragraph 3 of Section 315 of the Political Code, the first subdivisions of Sections 1823 and 1824 of the civil Code, subdivision 5 of Article 168 of the Mortgage Law in force, and Section 1 of Act No. 14, approved August 24, 1933, are hereby expressly amended in so far as they refer to the period within which the liens for taxes owed to The People of Puerto Rico shall have preference and solely in so far as they refer to this deferment of taxes.

Section 15.—If any provision of this Act or its application to any person or under any circumstance is declared null, the rest of the Act and the application of said provision to other persons or under other circumstances shall not be affected.

Section 16.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 17.—This Act, being of an urgent character shall take effect immediately after its approval.

Act No. 122, approved May 13, 1937; Laws of 1937, pp. 275-277.

To amend Sections 3, 4, 8, and 9 of Act No. 23, approved July 16, 1936, entitled "An Act to authorize the Treasurer of Puerto Rico to defer the payment of taxes on real property that are due and pending payment, including those deferred by Act. No. 10, of August 19, 1933, as amended by Act No. 30, of May 11, 1934, or on property which may have been sold for taxes and is within the legal term for redemption, for the year 1934-35 and preceding years; to determine the form and conditions of said deferment: to constitute a preferred lien for the taxes hereby deferred, which lien extends the period of duration of the preference of the lien established by Section 315 of the Political Code, Sections 1823 and 1824 of the Civil Code, Article 168 of the Mortgage Law and Section 1 of Act No. 14, approved August 24, 1933; to declare in force the attachments made for the collection of these taxes until they are paid; to authorize the Treasurer to borrow money and to provide for the manner of paying the interest and of amortizing the debt contracted; to appropriate funds for the application of this act, and for other purposes"; to extend the term within which delinquent taxpayers must pay the taxes owing on real property, so that they may avail themselves of the benefits of the said Act No. 23, and for other purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Sections 3, 4, 8, and 9 of Act No. 23, approved July 16, 1936, entitled "An Act to authorize the Treasurer of Puerto Rico to defer the payment of taxes on real property that are due and pending payment, including those deferred by Act No. 10, of August 19, 1933, as amended by Act No. 30, of May 11, 1934, or on property which may have been sold for taxes and is within the legal term for redemption, for the year 1934-35 and preceding years; to determine the form and conditions of said deferment; to constitute a preferred lien for the taxes hereby deferred, which lien extends

the period of duration of the preference of the lien established by Section 315 of the Political Code, Sections 1823 and 1824 of the Civil Code, Article 168 of the Mortgage Law and Section 1 of Act No. 14, approved August 24, 1933; to declare in force the attachments made for the collection of these taxes until they are paid; to authorize the Treasurer to borrow money and to provide for the manner of paying the interest and of amortizing the debt contracted; to appropriate funds for the application of this Act, and for other purposes," are hereby amended to read as follows:

"Section 3.—The Treasurer of Puerto Rico, upon the application of any taxpayer, his successors, or any of them, or his legal proxy, or attorney, may authorize the deferment of the collection of the taxes which said taxpayer owes on real property for the year 1934-35 and preceding years. The taxes so deferred shall be paid during a term of twenty (20) years, beginning April 1, 1938, by twentieths: the instalments shall become due April 1 of each year, and the first instalment shall become due on April 1, 1938, and the twentieth instalment on April 1, 1958.

"Section 4.—The collection of each of the tax receipts on real property the taxes on which may be deferred shall be suspended, and the Treasurer of Puerto Rico shall order that the amount of taxes owed on each of such real properties, not including interest, surcharges, fees for attachment, proceedings, and expenses for notices of public sale, shall be made to appear on a new receipt which shall be called a deferred-tax receipt. These deferred-tax receipts shall be divided into twenty sections, to be collected on the dates hereinbefore provided and shall bear interest at the rate of three (3) per cent per annum counting from April 1, 1937.

"Section 8.—It shall be an express condition for such deferment as the Treasurer may make of the delinquent taxes of a taxpayer, that the latter shall accompany his application therefor with the amount to pay for at least one year of the taxes assessed for the years 1935-36, 1936-37, and the first semester of the year 1937-38, and that the said delinquent taxpayer shall pay before December 31, 1937, all the taxes assessed for the years 1935-36, 1936-37, and for the first

semester of the year 1937-38. As a reward for the faithful fulfillment of the contract of deferment, the Treasurer shall divide into twenty (20) equal parts the whole amount that the taxpayer owes for interest, surcharges, fees for attachment proceedings, and expenses for notices of public sale, at the time of making the deferment, and shall remit the proportional amount of those corresponding to the installment or installments of the deferred debt that the taxpayer may have paid."

"Section 9.—If any taxpayer whose taxes have been deferred under this Act fails to pay at maturity the taxes that may have been levied for 1935-36, 1936-37, and the first semester of the year 1937-38, and those for succeeding years, as they fall due, or fails to pay the corresponding part of the receipt for taxes deferred under this Act, when it falls due, the taxes owed shall be deemed to have become due and the Treasurer shall collect them by means of attachment proceedings as provided by the Political Code, adding to the amount of the taxes deferred and unpaid, the amount for interest, surcharges, fees for attachment proceedings, and the expenses for notices of public sale that the taxpayer may owe at the time of deferment, less the total amount of the taxes deferred and paid that may have been remitted by the Treasurer, as provided in Section 8 of this Act."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent and necessary character, shall take effect immediately after its approval.

Political Code, Section 315 [Par. 2967, Comp. of Rev. Stats. and Codes, p. 557].

Sec. 315. (*As amended by Act of March 14, 1907, p. 338.*) That it shall be the duty of the assessor in making the assessment, or in revising the existing assessment, to list each piece or parcel of real estate separately, and to give each its assessed value, together with a description of it, and the name and address of its owner, insofar as such information can be obtained. Where the real property embraces both land and improvements, the assessed value of the land and of the improvements shall

be given separately. The tax that is assessed for the current fiscal year, and for the three prior fiscal years, against each piece or parcel of real property, including any improvements that may be thereon, or that may be subsequently placed thereon, shall constitute the first lien thereon, and shall be prior to all other liens whatsoever on said property, whether the said liens attach before or after the lien of said taxes; * * *.

Mortgage Law, Article 168, subdivision 5 [Par. 6852, Comp. of Rev. Stats. and Codes, p. 1086].

Art. 168. A statutory mortgage is established:

1. In favor of married women * * *.

5. (*As amended by act March 14, 1907, p. 330.*) In favor of The People of Porto Rico and the corresponding municipality on the property of the taxpayers for the amount of the taxes of the three annual assessments and the current unpaid annual assessment of the taxes which burden same.

Civil Code (Ed. of 1930).

Section 1823.—(*Section 1824, Civil Code of 1902, as amended by act of March 10, 1910, page 124 and act of March 9, 1911, page 155*). With regard to certain real property and rights on realty of the debtor, the following shall have preference:

1. Credits in favor of The People of Porto Rico or of the corresponding municipality with regard to the property of the taxpayers for the amounts of the last three annual assessments and the current annual assessment, unpaid, of the taxes which burden the same.

* * *.

Section 1824.—(*Section 1825, Civil Code of 1902, as amended by act of March 10, 1910, page 125 and act of March 9, 1911, page 155.*) With regard to all other personal and real property of the debtor preference shall be given to:

Section 1. Credits in favor of The People of Porto Rico and of the corresponding municipality for the taxes of the last three annual assessments due and the current unpaid annual assessment which are not covered by paragraph one of the preceding section.

APPENDIX IV

CHRONOLOGY

1. Prior to August 19, 1933, under the laws of Puerto Rico, the lien of unpaid real estate taxes,

> "for the current fiscal year, and for the three prior fiscal years",

constituted a first lien on the property, "prior to all other liens whatsoever on such property, whether the said liens attached before or after the lien of said taxes" (*Political Code, enacted March 1, 1902, Section 315, as amended by the Act of March 14, 1907* (*Laws of 1907, p. 338*) [*Comp. of Rev. Stats. and Codes of Puerto Rico, Par. 2967, p. 557*] *in connection with Sections 1823 and 1824 of the Civil Code* (*Ed. of 1930*), *and subdivision 5 of Article 168 of the Mortgage Law of Spain remaining in force in the Island, as amended by the above-mentioned Act of March 14, 1907*, Laws of 1907, p. 330 [*Comp. of Rev. Stats. and Codes of Puerto Rico, Par. 6852, p. 1886*].) Appendix III, *ante*, pp. 57-58.

2. On August 19, 1933, by Act No. 10 of the Special Session of that year (Laws of 1933, Spec. Sess., pp. 62-68; Appendix III, *ante*, pp. 49-50), the Legislature authorized the Treasurer of Puerto Rico to defer the payment of real estate taxes "due and pending collection" for the fiscal years 1932-1933, and preceding years, on the taxpayer's application, and to permit them to be paid in installments over a period of ten years, running from July 1, 1934. Section 5 of the Act provided that such deferred taxes, (Appendix III, *ante*, p. 50),

> "shall constitute a preferred lien on the property subject to the unpaid and deferred tax. This lien shall have preference and priority over any other lien which affects or may hereafter affect said properties, and this lien shall not be cancelled until the deferred taxes and interest thereon, shall have been totally paid."

3. Five days later, on August 24, 1933, Act. No. 14 of

the same Special Session was approved (Laws of 1933, Spec. Sess., pp. 76-78; Appendix III, *ante*, pp. 50-51), providing, in its first section:

> "Section 1. With the exception of the taxes on the encumbered property for three years and for the current year, mortgage credits and crop loans are hereby declared to be liens having preference over any other charge or lien for taxes or for any other cause."

This Act made no express reference to Act. No. 10, above, approved only five days earlier, and it contained the usual general repealing clause (Sec. 6) of "All laws or parts of laws in conflict herewith." It did, nevertheless, contain the following saving provision:

> "Section 3.—It is hereby declared that this Act shall have, and has, a retroactive effect as regards charges and liens for taxes due, *other than property taxes, and to which, in accordance with the provisions of laws prior hereto, there has been given the character of a preferred lien.*" (*Italics supplied*)

4. Three years later, by Act No. 23 of the Special Session of 1936, approved July 16, 1936, carrying an emergency clause [Sec. 17] putting it into effect immediately upon its approval [Laws of Spec. Sess., 1936, pp. 160-170; Appendix III, *ante*, pp. 51-55], the Legislature again authorized deferment of unpaid real estate taxes by the Treasurer, and their receipt in installments; but this time for *twenty years*, to run from April 1, 1937; and again provided, along the same lines as in Section 5 of the earlier Act No. 10 of August 19, 1933, that [Sec. 5, Act No. 23, *supra*, at p. 162; Appendix III, *ante*, pp. 52-53]:

> "Section 5.—**The amount of the deferred-tax receipts** issued under this Act **shall constitute a preferred lien** on the property subject to the unpaid and deferred tax. **This lien shall have preference and priority over any other lien which already burdens or may be hereafter constituted on said properties.**" (*Emphasis supplied*)

And this time the Legislature added the following ex-

press further provision [*Ibid,* Act No. 23, Sec. 5, continuing (at p. 162), immediately following the last sentence above quoted; Appendix III, *ante,* p. 53]:

> "The term of duration of this lien for taxes levied on real property, which is established by Section 315 of the Political Code, Sections 1823 and 1824 of the Civil Code, Article 168 of the Mortgage Law and Section 1 of Act No. 14, approved August 24, 1933, is extended for a period of twenty (20) years and shall not be extinguished until the deferred taxes and the interest thereon have been totally paid;"

and also, by Section 14 (*ib.,* at p. 168; Appendix III, *ante,* p. 54), *expressly* amended all those prior statutes, "Paragraph 3 of Section 315 of the Political Code, the first subdivisions of Sections 1823 and 1824 of the Civil Code, subdivision 5 of Article 168 of the Mortgage Law in force, and Section 1 of Act No. 14, approved August 24, 1933",

> "in so far as they refer to the period within which the liens for taxes owed to The People of Puerto Rico shall have preference and solely in so far as they refer to this deferment of taxes."

5. In the meantime, after the passage of the first two Acts, Nos. 10 and 14, *ante,* of August 10 and August 24, 1933, but before the passage of the last mentioned Act No. 23 of July 16, 1936,—upon the request of the "Comunidad Jose J. Benitez e Hijos", one of the parties to this litigation [more often referred to in this record as "the community"],—the Treasurer had, on or about November 25, 1935,—*before this litigation was instituted,*—deferred the real estate taxes on its property [part of those involved in this case] for the fiscal years 1928-29 to 1932-33, "pursuant to Law No. 10", *ante,* of August 19, 1933 [Recital in foreclosure decree of September 18, 1939; R. 62, 64]; and the Treasurer had likewise, at the same time, on or about November 25, 1935, on the application of the Benitez Sugar Company, another of the parties to this litigation, similarly, under such Act No. 10 of August 19, 1933, deferred

the unpaid taxes on its properties, also among those here involved, for the same fiscal years, 1928-29 to 1932-33 (R. 65).

6. **After the passage of Act No. 23 of July 16, 1936,**[20] the first bill of complaint, of those ultimately consolidated in the consolidated foreclosure suit in which the order here in question was entered,—"Equity No. 2151", by the Bank of Nova Scotia against the community and the Benitez Sugar Company,—was filed, **October 20, 1936** (R. 1-21); and a Receiver was appointed the same day, October 20, 1936 [*Recital in foreclosure decree* of September 18, 1939; R. 36], "who took possession of the property and business of the defendant corporation and the community." The receivership was finally ordered terminated, and the Receiver discharged, some three and a half years later, by the order of April 3, 1940 (R. 98-100), from which the present petitioner, the People of Puerto Rico, took its appeal (R. 100) to the Circuit Court of Appeals.

7. Some six months after the Receiver's appointment, the Legislature by the above-mentioned amendatory Act No. 122 of May 13, 1937 [Laws of 1937, pp. 275-277; Appendix III, pp. 55-57], changed the date from which the 20 year installment payments of deferred taxes should begin to run, under the tax deferment Act No. 23 of July 16, 1936, *supra,* from April 1, 1937 [Sec. 3, Act of July 16, 1936], to April 1, 1938 [Sec. 3 of the Act of 1936, as amended by Sec. 1 of Act No. 122 of 1937],—that is to say, *postponed for one year* the date of the beginning of the twenty year installment period; but made no other change material here in any way in the provisions of Act No. 23 of July 16, 1936.

8. Some two months further along, the District Court made the two orders mentioned in our Petition here (*ante,*

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[20] More than 90 days after its passage, when it had already taken effect, in any event, regardless of its emergency clause.

p. 2), both **on or about July 9, 1937** [*Recitals in foreclosure decree* of September 18, 1939, R. 62, 66] upon petitions, respectively, of the community and of the Benitez Sugar Company, granting permission for filing applications to the Treasurer of Puerto Rico for deferment and payment in the twenty installments of the unpaid real property taxes on the properties of the community and of the Sugar Company, respectively, for the fiscal years 1928-1929 to 1934-1935, inclusive, pursuant to such Act No. 23 of July 16, 1936, as amended by Act No. 122 of May 13, 1937;[21] and, on the Receiver's applications, the Treasurer granted the deferments, in each case, the following year, September 21, 1938 (R. 62, 66).

9. Another year later, on September 18, 1939, as above indicated [*Petition, ante*, pp. 2-3], the foreclosure decree was entered in the consolidated litigation [R. 36-85; "Findings of Fact and Conclusions of Law and Decree"]. In that portion of it dominated "Findings of Fact" are contained the recitals above stated [R. 62, 66], concerning the permission given "on or about July 9, 1937" for filing applications for deferment of the taxes on behalf of the community and of the Benitez Sugar Company, respectively, and of the Treasurer's granting them. In that portion of the decree denominated "Conclusions of Law" [R. 70-76] are con-

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[21] The recital in the foreclosure decree (R. 62, *supra*) with relation to the application on behalf of the community,—*manifestly erroneously*,—is that it was to be made, "*pursuant to Law 23 of the Puerto Rican Legislature approved May 13, 1937, as amended.*" It clearly was intended to read,—like that on behalf of the Sugar Company (R. 66),—

> "pursuant to Law No. 23 of the Puerto Rican Legislature approved July 16, 1936, as amended by Law No. 122 of said Legislature approved May 13, 1937".

Act. No. 23 of 1937 has nothing whatever to do with any of the questions here involved. It is an Act directing the construction of a school building and a school playground at Arecibo (Laws of 1937, pp. 143-145).

tained the "Conclusions" ["V (A) (B) (C) and (D)"; R. 71-72] that,

> "(A) The People of Puerto Rico has valid first liens having preference and priority over any other claims and liens of any kind whatsoever * * * for 'the current fiscal year' and the 'three prior fiscal years', as provided by Section 315 of the Political Code, Section 1823 (1) of the Civil Code (1930 Ed.), Article 168 of the Mortgage Law and Section 1 of Law 14 of the Legislature of Puerto Rico approved August 24, 1933, and it further is entitled to the preference specified in Section 1824 (1) of said Civil Code with respect to all personal and real property of each of said debtors not specified in Sections 1822 and 1823 of said Civil Code."

[Sub-paragraphs "(B)", "(C)" and "(D)" specify which years are the "current" and "three prior" fiscal years, and the amounts of the taxes for those years, to which priority is thus given].

But with relation to the deferred taxes the court found ["Conclusions of Law", *supra,* Par. V.-(E) and Par. VI; R. 72-73] that:

> "V-(E) The People of Puerto Rico did not acquire a lien on the properties of the community and of the corporation, or any of them, superior to nor having preference and priority over the mortgage liens of complainant described in findings 6, 8, 10, 12 and 14 hereof, and referred to in these conclusions, by virtue of the deferment of payment of the unpaid property taxes assessed on said properties for the fiscal years 1928-29 to 1934-35, inclusive, pursuant to Law No. 23 of the Legislature of Puerto Rico, approved July 16, 1936 as amended by Law No. 122, approved May 13, 1937; nor did The People of Puerto Rico acquire a superior lien having preference and priority over said mortgage liens by virtue of the deferment of the payment of the real property taxes assessed on said properties for the fiscal years 1928-29 to 1932-33, inclusive, pursuant to Law No. 10 of said Legislature approved August 19, 1933."

"VI.-(A) Complainant has valid mortgage liens on each of the properties of the said community * * * *.

"(B) Complainant has valid mortgage liens on each of the properties of defendant Benitez Sugar Company * * *.

"(C) Said mortgage liens and chattel mortgage liens referred to in clauses (A) and (B) of this paragraph are, with respect to the said properties upon which constituted, superior to, and have preference and priority over any and all other claims, rights, liens, preferences and priorities of any kind whatsoever, * * * including all claims, liens and preferences of The People of Puerto Rico for taxes owing to it as specified hereinabove, except for the respective amounts of real property taxes specified in clauses (C) and (D) of conclusion V hereof."

10. The decree concluded with the following paragraph designated with the letter "O" (R. 85; Petition, *ante*, p. 4):

"All questions, issues, matters and things not hereby disposed of are hereby reserved by the court for its further adjudication, and any party to this cause may at any time apply to the court for further relief at the foot of this decree in respect of any matters not herein specifically provided for. **For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued.**" (*Emphasis supplied.*)

(14)

Office - Supreme Court, U. S.
FILED
MAY 31 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 903

THE PEOPLE OF PUERTO RICO,
Petitioner,

v.

THE BANK OF NOVA SCOTIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF.

BRIEF IN OPPOSITION TO PETITION

J. HENRI BROWN,
WALTER L. NEWSOM, JR.,
Counsel for Respondent.

May 26, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 993

THE PEOPLE OF PUERTO RICO,
Petitioner,

v.

THE BANK OF NOVA SCOTIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF.

BRIEF IN OPPOSITION TO PETITION

Statement

The judgment of the United States Circuit Court of Appeals for the First Circuit which petitioner (appellant below) seeks to have reviewed here, affirmed an order entered April 3, 1940 by the United States District Court for Puerto Rico approving the final accounts of its Receiver in consolidated foreclosure proceedings in equity, discharging him and directing cancellation on his bond.[1] Contrary to petitioner's assertion (Petition, p. 1) the order contained no provisions for any distribution.

[1] The statement on the title page of the Transcript of Record in the Circuit Court of Appeals that the appeal was from the decree of September 18, 1939 is erroneous. (See the Notice of Appeal, R. 113, Exhibit B.)

By this order of April 3, 1940, the District Court overruled the contention of petitioner that the Receiver should not be discharged because he had not paid petitioner's alleged prior tax claim set up in petitioner's intervention and answer filed in the foreclosure proceedings. As to that contention that Court held as follows (R. 99):

> "The tax claim of The People of Puerto Rico as to the amount and relative priority thereof was adjudicated by the final decree entered in this cause September 18, 1939, from which no appeal was taken.[2] A motion for rehearing filed by The People of Puerto Rico after expiration of the term at which said decree was entered was subsequently denied. That part of said tax claim held to enjoy priority over the mortgages foreclosed has been paid by the Special Master pursuant to provisions of said decree. There could be no obligation on the Receiver to pay any part of said tax claim. The Receiver had paid all taxes assessed on the properties in his custody during the receivership."

The operations of the Receiver were carried on at a loss, and his final accounts showed a deficit of almost $150,000.00 (R. 94-95). The Receiver never had in his custody any funds arising from the proceeds of the foreclosure sale. Such funds were paid by the purchaser to the Special Master (who was a different individual from the Receiver) and it was the Special Master, not the Receiver, who was by the foreclosure decree of September 18, 1939, charged with the duty of distributing the proceeds of the foreclosure sale (R. 118, see also the decree R., pp. 76-85). Following the sale and its confirmation, the properties were conveyed on December 23, 1939 to the purchaser by the Special Master (R. 90), the conveyance approved by order of the Court, and the Receiver, pursuant to order of the Court, delivered possession thereof to the purchaser on January 16, 1940 (R. 93).

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[2] In the record, page 99, the date is erroneously put as "September 18, 1940". The true date of entry appears in the Record at pp. 36, 88 and other places.

Thus at the time the Receiver filed his final accounts on February 29, 1940 (R. 92) which were approved by the said order of April 3, 1940 (R. 98-100), the Receiver had no funds or properties in his custody from which petitioner's alleged priority tax claim could have been paid or satisfied.

Petitioner does not contend that the Receiver's accounts should be surcharged, or that his official bond should be held liable for petitioner's claim. As the District Court stated in the said order appealed from (R. 99):

> "An examination of the record and especially the reports on the audits of the Receiver's accounts—shows that the Receiver has diligently and efficiently performed the duties appertaining to his charge, that he has carried out all orders and instructions given to him by the Court, and that he has duly accounted for all the properties and moneys coming into his hands as receiver. And in fact no one has contended otherwise."

And petitioner did not make the Receiver a party appellee to the appeal from the said order of April 3, 1940.[3]

Petitioner never appealed from the foreclosure decree of September 18, 1939 in which its tax claim and the priority thereof was adjudicated (R. 116). It did file a motion for reconsideration of said decree in the next succeeding term of the District Court and after the time within which an appeal might have been taken, which motion was denied (R. 88-92). Petitioner filed a notice of appeal from the order denying this motion for reconsideration after expiration of the statutory term within which an appeal might have been taken.[4] This abortive appeal, however, was dis-

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[3] (See Certificate of Clerk of District Court, par. 7, R. 107, appellant's Statement of Points, R. 101-102, and Designation of Contents of Record on Appeal, R. 102-103.)

[4] Petitioner now says that this belated appeal was not perfected because the Order of the District Court denying the motion for reconsideration was considered by it as "interiocutory". (Petition, par. 6, pp. 8-9.) It seeks to justify its failure to seasonably take the appeal by

missed by the Circuit Court of Appeals for lack of jurisdiction (R. 117, first full paragraph).[5]

Petitioner made no objection to the Special Master's sale under the foreclosure decree held November 14, 1939, nor to his report, nor to the confirmation of that sale by the District Court December 11, 1939 (R. 89-90). Nor did it ever appeal from the decree of confirmation.

Petitioner never made any objection to the execution by the Master of the deed of conveyance to the purchaser (R. 90) nor to the delivery to the purchaser of possession of the properties by the Receiver (R. 93).

Petitioner accepted without objection the payment by the master from the proceeds of the foreclosure sale of that amount of its tax claim held to have priority by the foreclosure decree (R. 91 and 99), and it made no objection to his distribution, final report, accounting and discharge.

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asserting that the New Rules for Civil Procedure had just become effective. (Petition note 6, p. 8.) But the statutory term within which an appeal may be taken (Act of February 13, 1925, Section 8(c); 28 U. S. C. A. 230) was in no way affected by the New Rules. (Note 3 of the "Notes of Advisory Committee on the Rules" following Rule 73.)

[5] While it seems obvious that neither this Court nor the Circuit Court of Appeals could have any jurisdiction to review the order of the District Court denying the motion for reconsideration, yet petitioner's contention is that the District Court erred in refusing to reconsider the foreclosure decree. For the first time, petitioner here urges that its motion for reconsideration should have been considered by the District Court as a "Bill of Review" for error apparent on the face of the record (Petition, Fourth par., p. 11). But it is fundamental that a bill of review for error apparent on the face of the record cannot be filed after expiration of the statutory term within which an appeal might have been taken. (*Thomas* v. *Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 34 L. ed. 97; *Hagerott* v. *Adams*, 8 Cir. 1932, 61 F. (2d) 35, cert. den. 288 U. S. 599, 77 L. ed. 975.) Nor do we understand how petitioner can on the one hand contend that the foreclosure decree was not final, and on the other contend that its motion for reconsideration should have been considered as a bill of review. A bill of review lies only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. (*John Simons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88, 66 L. ed. 475; *First Nat. Bank* v. *Flershem*, 290 U. S. 504, 522, 78 L. ed. 465, 477.)

It took no appeal from the order approving said distribution, report and accounting, discharging the master and ordering the cancellation of his bond. Not included in the transcript of record.)

On the appeal from the order of April 3, 1940 approving the Receiver's accounts, discharging him and directing cancellation of his bond, petitioner, however, sought to have the Circuit Court of Appeals review the foreclosure decree of September 18, 1939, and the order of January 31, 1940, denying its motion for reconsideration. It contended that the foreclosure decree was erroneous under a subsequent decision of the appellate court (*People of Puerto Rico* v. *The Federal Land Bank*, 1 Cir. Dec. 15, 1939, 108 F. (2d) 275, Reh. Den. Jan. 19, 1940), upholding the validity of Section 5 of Act No. 23 of the Puerto Rican Legislature approved July 16, 1936 as amended by Act No. 122 of that Legislature approved May 13, 1937 (Petition, p. 2). This was not the ground urged by petitioner in its motion of reconsideration which the District Court had denied.[6]

Petitioner would have the Court assume that the foreclosure decree of September 18, 1939 showed error on the face of the record, that said decree held Section 5 of said Act No. 23 of July 16, 1936, as amended by said Act No. 122 of May 13, 1937, to be invalid, contrary to said decision of the Circuit Court of Appeals in the case of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* as a result of which in excess of $100,000.00 of the public reve-

[6] The ground urged in support of the motion for rehearing was that the foreclosure decree of September 18, 1939, was erroneous under the decision cited, because the District Court had by said decree held invalid Section 5 of Act No. 10 of the Puerto Rican Legislature approved August 19, 1933 (R. 86). But at the same legislative session by Act No. 14 approved August 24, 1933, Section 5 of said Act No. 10 of August 19, 1933 was repealed and the pre-existing law reestablished (R. 90, third full paragraph). And the decision cited in no way involved Act No. 10 of August 19, 1933. Petitioner now urges that the mention of Act 10 of August 19, 1933 in the motion for reconsideration was an inadvertent error (Petition note 5, p. 8). The motion, however, was never amended. We think petitioner made no such inadvertent error but rather misconceived the effect of the decision cited.

nues dues would be lost.[7] We say "assume" because the Transcript of Record does not contain any of the evidence on which said decree is based. In fact, however, the District Court made no such holding. The determination of the validity of Section 5 of said Act as amended is not involved in said decree.[8]

And petitioner would now have this court review the decision of the Circuit Court of Appeals on the ground that that Court, on an appeal from the order of April 3, 1940 approving the final accounts of the Receiver, discharging him and directing cancellation of his bond, had refused to review the foreclosure decree of September 18, 1939 and the order refusing its reconsideration.

The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals for the First Circuit affirmed the order of the District Court of April 3, 1940 approving the receiver's accounts, discharging him and directing cancellation of his bond.

It held (A) that there was no further occasion for the continuance of the receivership, that the receiver had fully

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[7] The total amount of real estate taxes which could possibly be subject to Section 5 of said Act, as amended, assuming said Act to be applicable, would be substantially less than $100,000 (R. par 19(f), p. 63 and par. 21(i) p. 66).

[8] There was no deferment or extension of any taxes under said Act No. 23 of July 16, 1936, as amended. Payments were made of taxes by the receiver and accepted by petitioner under a court order that such payments would not affect the priority of the mortgages as existed when the receivership commenced, and in the allocation by the foreclosure decree of the payments so made by the receiver under said order, they were applied on taxes due for the current and three past annual assessments (R. par. N, p. 85; par. 19(d), p. 62, and par. 21(g), p. 66, and R., p. 91). The District Court concluded that there was no deferment under the said Act and that the lien and priority provided in Section 5 of the Act never attached (R. par. E, p. 72). It held (R. 91) that the decision of the appellate court could not, therefore, have any effect on the decree of September 18, 1939. Petitioner's contention that the tax lien existing at the commencement of the receivership was measured by Act 23 of July 16, 1936, is therefore equally untenable, since that act applied only in case a deferment of taxes had been made thereunder.

accounted, and was entitled to his discharge and the cancellation of his bond; that (B) the issues with respect to the priority of petitioner's tax claim had been finally determined and adjudicated by the foreclosure decree of September 18, 1939, had become *res judicata,* and could not be again raised when the District Court was considering the receiver's final report.

The Circuit Court also dismissed petitioner's appeal from the order of the District Court denying the motion for reconsideration of the foreclosure decree because taken after expiration of the statutory period within which an appeal might have been taken.[9]

The opinion is reported in Volume 116 Fed. (2d) pp. 379 *et seq.*

ARGUMENT

POINT I

The Receiver was entitled to his discharge and cancellation of his bond.

A receiver in equity is an officer of the Court which appoints him, and the property in his custody is not in a legal sense, in his possession, but is in the possession of the Court whose appointee he is, by him as the Court's officer. (*Taylor* v. *Sternberg,* 1935, 293 U. S. 470, 472, 79 L. ed. 599, 602.) And the power of the appointing Court to wind up the receivership and discharge the receiver is a necessary adjunct to its power of appointment. (*Jennings* v. *F. & C. Trust Co.,* Ky. App. 1931, 240 Ky. 24, 41 S. W. (2d) 537.)

The exercise of this power by the appointing Court is so largely within its sound judicial discretion, that an appel-

[9] Petitioner apparently contends that the Circuit Court of Appeals affirmed the order denying the motion for reconsideration of the foreclosure decree (Petition, p. 12, first full par.). Obviously it did not do so, having dismissed the appeal therefrom for lack of jurisdiction.

late court will not review the action of the former in the absence of a manifest abuse of discretion. (*M. & M. R. R. Co.* v. *Soutter,* 1865, 2 Wall. 510, 17 L. ed. 900; *McLeod* v. *Hayward,* 5 Cir. 1927, 17 F. (2d) 900.)

When the purpose of the receivership has been accomplished, or the reason or necessity therefor has ceased, as for instance when the property has been sold in foreclosure and the sale confirmed (*Larsen* v. *U. S. Mortgage & Title Co.,* 93 N. Y. S. 613), or when the cause has been finally determined, and all issues litigated are at an end (*State ex rel. Ondin* v. *Superior Court,* Wash. S. C. 1903, 31 Wash. 481, 71 P. 1095), or the property has been held to belong to one of the parties (*Very* v. *Watkins,* 1860, 23 How. 469, 16 L. ed. 522), it should be terminated.

After sale and confirmation, the receiver's continued possession of the property sold is not as receiver but as agent for the purchaser. (*Very* v. *Watkins; Larsen* v. *U. S. Mortgage & Title Co., supra.*) Under such circumstances it becomes the duty of the appointing court to terminate the receivership (*Mitchell* v. *Lay,* 9 Cir. 1932, 60 F. (2d) 941), and the purchaser should apply for his discharge in order to avoid any liability arising from the receiver's apparent authority. (*Langdon* v. *V. & C. R. Co.,* Vt. S. C., 1880, 53 Vt. 228; *Larsen* v. *U. S. Mortgage & Title Co., supra.*)

Here the litigation between the parties had been terminated by the foreclosure decree of September 18, 1939. The properties had been sold in foreclosure by the master pursuant to that decree, and that sale had been confirmed. The purchase price had been paid to the master, who had distributed it pursuant to the decree including payment to petitioner of the amount of its claim held to enjoy priority, and the final report of the master had been approved, and he had been discharged. The deeds of conveyance had been executed and possession of the properties had been delivered to the purchaser. And no appeal from any of these decrees or orders had been taken by petitioner.

No one had questioned any item in the receiver's final accounting, and he had performed all of his duties diligently and efficiently. He had no funds nor properties in his hands, nor was he under any obligation to satisfy petitioner's claim. Petitioner made no contention that his accounts should be surcharged or that his official bond should be attached. Petitioner did not make him a party appellee in the appeal to the Circuit Court of Appeals.

The receiver was clearly entitled to his discharge and the cancellation of his bond, and the Circuit Court of Appeals, in affirming the District Court's order of April 3, 1940, correctly so held.

POINT II

The issues relating to petitioner's tax claim did not lie within the scope of review in an appeal from the Order of April 3, 1940.

A. **Such issues were not raised in the proceedings for approval of the receiver's final accounting, for his discharge and cancellation of his bonds.**

The proceedings on the receiver's final report and accounting were independent proceedings on a side issue in the cause in which the petitioner on the one side and the receiver on the other were the real and interested parties. (*Hovey* v. *McDonald*, 1883, 109 U. S. 150, 27 L. ed. 888.) As said in the case of *Nashlund* v. *Moon Motor Car Co.*, Mo. S. C., 1939, 345 Mo. 465, 134 S. W. (2d) 102, 105:

> "The final report of the receiver and the exceptions (objections) thereto occupy the status of pleadings, the report having the relative status of a petition or complaint, and the exceptions having the relative status of an answer. (*Cases cited.*) And the analogy continues in that the burden of proof rests on the receiver as upon a plaintiff. * * *"

And the determination and adjudication of the issues raised thereon result in a final and appealable decree. (*Barnett* v. *Schickerling Products Corp.*, N. J. Ch., 1932, 112 N. J. Eq. 1, 163 A. 144; *U. S. Fidelity & Guaranty Co.* v. *Higgins*, 9 Cir. 1930, 41 F. (2d) 739; *Yoelin* v. *Kudla*, Ill. App. 1939, 502 Ill. App. 413, 24 N. E. (2d) 67.) From such final decree the receiver has the right of appeal, *although he would not have the right of appeal from the foreclosure decree*, or that confirming the sale. In the case of *Hinckley* v. *G. C. & S. R. R. Co.*, 1877, 94 U. S. 467, 24 L. ed. 166, it was said:

> "* * *. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. * * *. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. * * *"

And the principal party to an appeal from such a decree is the receiver. (*Hovey* v. *McDonald, supra; Haigh* v. *Carroll*, Ill. S. C., 1902, 197 Ill. 196, 64 N. E. 375.)

Thus in the proceedings on the receiver's final accounts, none of the issues adjudicated by the foreclosure decree, the order denying the motion for its reconsideration, decree of confirmation, or order approving the distribution and final report of the Special Master, could have been raised by the pleadings (that is, the final report of the receiver and petitioner's objections thereto), nor could any such issues have been determined by or been embraced in the order of the District Court of April 3, 1940 approving the accounts, discharging the receiver and directing cancella-

tion of his bond. Nor did the District Court purport to decide any such issues. Hence there were no such issues to be reviewed on appeal by the Circuit Court of Appeals.

What the District Court did hold was that the receiver had no obligation to pay petitioner's tax claim, that he had no funds or property in his custody, and that the petitioner's tax claim had been finally adjudicated by the foreclosure decree.

And if the order of April 3, 1940 be reversed and the matter be remanded to the District Court, there would still be nothing there to be decided by that Court with respect to the tax claim of petitioner, and there would be no funds or property there from which any such claim could be satisfied. And in fact petitioner seeks no such reversal.[10] Instead petitioner asks that the foreclosure decree and the order refusing its reconsideration be reversed, that the sale and its confirmation and the distribution of the proceeds arising therefrom by the master (a different individual from the receiver) all be set aside and held as naught.[11]

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[10] The omission of the receiver as a party appellee would be fatal since the appellate court could not proceed to a revision of the order appealed from without the receiver being made a party appellee upon such terms as to give him due notice and an opportunity to be heard. (*In re Knox-Powell-Stockton Co.*, 9 Cir. 1938, 97 F. (2d) 61; *Edwards* v. *Holland Baking Co.*, 8 Cir. 1935, 75 F. (2d) 713.) The receiver is clearly an indispensable party appellee. (*Hovey* v. *McDonald, Hinckley* v. *G. C. & S. R. R. Co., Haigh* v. *Carroll, Yoclin* v. *Kudla, supra.*)

[11] The notice of the untimely appeal by petitioner from the order of the District Court of January 31, 1940 denying the motion for reconsideration of the foreclosure decree (which appeal was dismissed) and the notice of appeal from the order of April 3, 1940, were both filed in the District Court May 1, 1940 (R. 113-114, Exhibits B and C). The "Statement of Points" (R. 101) and Designation of Contents of Record (R. 102) filed June 21, 1940 in the District Court tend to show that petitioner was chiefly interested in the appellate review of the order of January 31, 1940. Respondent's motion to dismiss was filed October 14, 1940 (R. 105) and the case and motion were argued before the Circuit Court of Appeals, December 3, 1940 (R. 118). While it does not appear at just what time petitioner discovered that its appeal from the order of January 31, 1940 had been taken after expiration of the time for appeal, it does appear that in spite of that, it nevertheless attempted to raise before

B. **Such issues had been finally determined and had become res judicata.**

On appeal from decrees or orders made subsequent to a prior final decree from which no appeal is taken, there can be no review by the appellate court of the issues determined by the prior decree. (*Terry* v. *Sharon*, 1889, 131 U. S. 40, 33 L. ed. 94; *Central Trust Co.* v. *Grant Locomotive Works*, 1890, 135 U. S. 207, 34 L. ed. 97; *Turner* v. *Farmers' Loan & Trust Co.*, 1883, 106 U. S. 552, 27 L. ed. 273; *Reed* v. *Allen*, 1932, 286 U. S. 191, 76 L. ed. 1054; *Long* v. *Maxwell*, 4 Cir. 1894, 59 Fed. 948; *Lafontan* v. *Elting*, 2 Cir., 1932, 58 F. (2d) 180.)

The issues thus determined by the prior final decree are *res judicata*. (*Turner* v. *Farmers' Loan & Trust Co.; Central Trust Co.* v. *Grant Locomotive Works; Hinckley* v. *G. C. & S. R. R. Co., supra; Mayer* v. *White*, 8 Cir., 1926, 12 F. (2d) 710.)

And the prior final decree or judgment, not set aside on appeal, is equally effective as an estoppel upon the issues decided, whether the decree be correct or erroneous. (*Reed* v. *Allen, supra.*)

If the rule were otherwise, litigation would become interminable, and the statutes prescribing terms within which appeals may be taken would be rendered nugatory.

The foreclosure decree of September 18, 1939 was beyond question a final and appealable decree as to the issues with respect to petitioner's tax claim. It adjudicated the specific amounts of the mortgage debts due respondent, the amount of its mortgage lien on each parcel of property, and the amount of taxes due petitioner on each of the various parcels involved. It also determined that taxes in the amount of approximately $5,000 constituted a lien on the mortgaged property in preference to that of the mortgagee; but it determined, further, that with respect

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the appellate court the questions which while properly within the scope of review in the abortive appeal (assuming said order to be appealable), were outside the scope of review on the appeal from the order of April 3, 1940.

to the remaining part of petitioner's claim for taxes, its lien was subordinate to that of respondent. Payment of the mortgage debts by a day certain was ordered, in default of which it was decreed that the properties should be sold on foreclosure, free and clear of all liens, by a Special Master named in the decree. Provision was made for the distribution of the proceeds of this foreclosure sale. It provided that if respondent should be the successful bidder in this sale, it could apply the mortgage debts to the payment of the purchase price; but if the amount of any accepted bid of respondent should be equal to or less than the mortgage debt on the property to which such bid referred, respondent was obliged to pay in cash that part of the bid required to cover the expenses of the sale, the real estate taxes held to constitute a lien prior to that of respondent, any unpaid indebtedness properly incurred by the receiver in operating the properties and the compensation of the receiver.

This was clearly a final and appealable decree as to petitioner's claim. (*Central Trust Co.* v. *Grant Locomotive Works; Turner* v. *Farmers' Loan & Trust Company; Mayer* v. *White, supra; Harrison* v. *Clark,* 8 Cir. 1908, 164 Fed. 539, cert. den. 214 U. S. 524, 53 L. ed. 1067.)

Petitioner contends that the decree would have been final and appealable but for paragraph "O" thereof (R. 85) which he asserts rendered it interlocutory[12] (Petition pp. 17 *et seq.*).

As to this contention, the District Court, in denying petitioner's motion for reconsideration, held and said (R. 89):

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[12] Paragraph "O" reads as follows:

> "All questions, issues, matters and things not hereby disposed of are hereby reserved by the Court for its further adjudication, and any party to this cause may at any time apply to the court for further relief at the foot of this decree in respect of any matters not herein specifically provided for. For the purpose of making any further order or decree in relation to any matter arising in connection with this decree, or any sale thereunder, the present term of this court is continued."

> "Such a decree is clearly final for it determines the rights of the parties so that nothing is left to be done but the execution of its provisions. Affirmance of such a decree by the Appellate Court would end the suit and execution of the provisions thereof by this Court would be all that remained to be done. The reservation in the decree for further directions simply related to such execution and cannot be availed of as rendering it less final or as leaving open points expressly decided by it at the time it was entered."

And petitioner's unseasonable appeal from this holding was dismissed by the Circuit Court of Appeals (R. 117).

Similar provisions in a final decree have frequently been so interpreted by the Courts. (*Bank* v. *Sheffey*, 1891, 140 U. S. 445, 35 L. ed. 493; *American Engineering Co.* v. *Metropolitan By-Products Co.*, 2 Cir., 1921, 275 F. 40; *Harrison* v. *Clark, supra; Kiehn* v. *Dodge County*, 8 Cir., 1927, 19 F. (2d) 503.)

And if there were in fact any ambiguity or uncertainty in the meaning which the District Court sought to convey by the language of paragraph "O" of the decree, certainly the one authoritative source to resolve the ambiguity or make certain the uncertain would be the court (here the same judge) who rendered the decree. (*Mercantile Trust Co. of N. Y.* v. *Chicago, P. & St. L. Ry.*, 7 Cir. 1903, 123 F. 389; *Elder* v. *McCloskey*, 6 Cir. 1895, 70 Fed. 529, 555 *et seq.*)

Extracting and isolating the second sentence of paragraph "O", petitioner, through rare ingenuity, is apparently able to discover that the District Court left open for readjudication any and all questions determined by the decree and continued the then term of Court for such purpose. We are unable to see what petitioner sees. The first sentence plainly reserves for further adjudication any matters not determined in the decree. The second sentence continues the term of court for making any further order or decree (not for modifying the foreclosure decree) *in relation to any matter arising in connection with this decree or any sale thereunder.* The words *in relation to any*

matter arising in connection with this decree are not the equivalent of the words *any matter determined by this decree,* as petitioner would have the Court believe. If so, then the first sentence of paragraph "O" of necessity becomes absolutely meaningless. The language *any matter arising in connection with this decree* presupposes the existence of the decree with some collateral matter arising in connection with its application or execution. An examination of the entire decree will show that many matters might have arisen, and they in fact did arise, in connection with its application and execution other than the sale made thereunder.

The suggestion that the last sentence of paragraph "O" was expressly designed by the court to permit readjudication of petitioner's tax claim in the event the Circuit Court of Appeals should reverse the District Court in the appeal then pending in the cases of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* seems to be a wistful afterthought of petitioner. As we have already pointed out, the determination of the validity of Section 5 of Act No. 23 of July 16, 1936, as amended, was not involved in the foreclosure decree. (See note 8, *supra.*) And the District Court said (R. 91) that that appellate decision could not have affected the foreclosure decree of September 18, 1939.

Furthermore, after the foreclosure decree, the sale was had and confirmed (Dec. 11, 1939), the conveyances were executed (Dec. 23, 1939), possession of the properties delivered to the purchaser (January 16, 1940), and the distribution of the proceeds of sale was made by the master, all without objection or opposition of petitioner. The case of *The People of Puerto Rico* v. *The Federal Land Bank, supra,* was decided by the appellate court December 15, 1939 (three days before expiration of the term for taking an appeal from the foreclosure decree). And the District Court knew of this appellate decision at least by December 26, 1939 (R. 86), probably earlier. If the District Court thought, or had ever thought, that the pending appeal in that case might affect the correctness of the fore-

closure decree, it is inconceivable that it would have continued with the execution of the foreclosure decree and the distribution of the proceeds of sale.

In support of its contention that the foreclosure decree was interlocutory, and not final, petitioner now urges that its motion for reconsideration should have been considered as a bill of review for error apparent on the face of the record, and granted by the District Court.[13] Quite aside from the impropriety of raising that question now, for no appeal was seasonably taken from the order of January 31, 1940, denying the motion, it is quite clear that such a contention is utterly frivolous, and at the same time absolutely inconsistent with petitioner's contention that the foreclosure decree was interlocutory and not final. In the first place, a bill of review lies only against a final decree. And in the second place, if brought to correct error apparent on the face of the record a bill of review must be brought within the term for appeal. (See cases in note 5, *supra.*) The motion for reconsideration was not filed until after expiration of such statutory term (R. 89-90).

The decree of confirmation of the foreclosure sale is likewise a final and appealable decree. (*Turner* v. *Farmers' Loan & Trust Co.; Mayer* v. *White, supra; Dant & Russell, Inc.* v. *J. D. Halstead Lumber Co.*, 9 Cir., 1939, 103 F. (2d) 306.) Petitioner never appealed from that decree. And even if it had done so, issues determined by the foreclosure decree could not have been there reviewed. (*Turner* v. *Farmers' Loan & Trust Co., supra.*)

And the order approving the master's distribution of the proceeds of the sale, his final accounting and discharging him and directing cancellation of his bond was likewise final. (See *Krietmeyer* v. *Hemphell,* 5 Cir., 1927, 19 F.

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[13] By the English rule the error must have been apparent on the "body of the decree" which, however, means the same as "apparent on the face of the record", because in th English practice the whole pleadings and findings in substance were embodied in the decree, while in the federal practice the files of record and the findings are not so embodied. (*Whitney* v. *Bank of United States,* 1839, 13 Pet. 6, 10 L. ed. 33.)

(2d) 513, cert. den. 275 U. S. 496, 72 L. ed. 392; *Dant & Russell* v. *J. D. Halstead Lumber Co., supra.*) But no question determined by the prior final foreclosure decree or order confirming the sale could have been raised on an appeal therefrom.

Assuming that the order of January 31, 1940 denying the motion for rehearing was an appealable order, that appeal has been dismissed because taken after expiration of the statutory term. That means that the Circuit Court of Appeals acquired no jurisdiction and that petitioner could not, therefore, have had an appellate review of that order. In spite of this petitioner urges as a ground for certiorari that there is an error apparent on the face of the record as to said order denying the motion for reconsideration (Petition, pp. 31-32).

And in conclusion, we reiterate that petitioner would have this Court assume that there is error apparent on the face of the record, without having brought up the record,[14] and in the face of the District Court's holding that there was no such error.

It seems highly questionable for a litigant who has so inexplicably failed, as has petitioner, to avail itself of the liberal and simple remedies afforded by the appeal statutes of long standing, to now assert that the trial court has failed to discharge its "plain duties" and has "deliberately disregarded" the applicable statutory law. Particularly is that so when such assertions are made in the face of holdings by the trial court to the contrary and in the absence of inclusion in the transcript of record of the evidence on which said holdings were made.

POINT III

The petition shows no ground for certiorari.

From the above it is clear that none of the questions presented by petitioner (Petition, pp. 9-12) were at issue

[14] The transcript of the record on appeal, here presented, does not include the evidence upon which the foreclosure decree was made nor all of the pleadings.

in the appeal below from the order of April 3, 1940, approving the receiver's final accounts, discharging him and directing cancellation of his bond.

Moreover, the foreclosure decree was a final decree from which no appeal was taken. And no appeal was taken from the order denying a reconsideration thereof.

The motion for reconsideration was not a bill of review to correct error apparent on the face of the record, and if so considered, was unseasonably filed.

Furthermore, the foreclosure decree did not involve any determination of the validity of Section 5 of Act No. 23 approved by the Puerto Rican Legislature July 16, 1936, as amended.

Finally no question as to the lien or priority of petitioner's tax claim was raised in the proceedings in the District Court leading to the order of April 3, 1940.

Conclusion

The decision of the Circuit Court of Appeals is correct. There is no conflict of decisions, no question of Federal law of public importance calling for a review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Henri Brown,
Walter L. Newsom, Jr.,
Counsel for Respondent.

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